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✓
N. 2991
No. 14359

United States
Court of Appeals

for the Ninth Circuit

Exhibits in custody
of Clerk.

See Vol. 2892
SHIRLEY KREMEN, CARL ROSS, SAMUEL
IRVING COLEMAN, and SIDNEY STEIN-
BERG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 468, inclusive)

Appeals from the United States District Court for the Northern
District of California, Southern Division

FILED

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PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California - 11-15-54 CLERK

No. 14359

United States
Court of Appeals
for the Ninth Circuit

SHIRLEY KREMEN, CARL ROSS, SAMUEL
IRVING COLEMAN, and SIDNEY STEIN-
BERG, Appellants,
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NAMES AND ADDRESSES OF ATTORNEYS

GLADSTEIN, ANDERSEN & LEONARD

appeared for Defendants, Shirley Kremen, Carl
Ross and Samuel Irving Coleman,
240 Montgomery Street,
San Francisco, California.

Defendant Sidney Steinberg appeared in pro per.

Attorneys for Defendants and Appellants.

LLOYD H. BURKE,

United States Attorney,

ROBERT H. SCHNACKE,

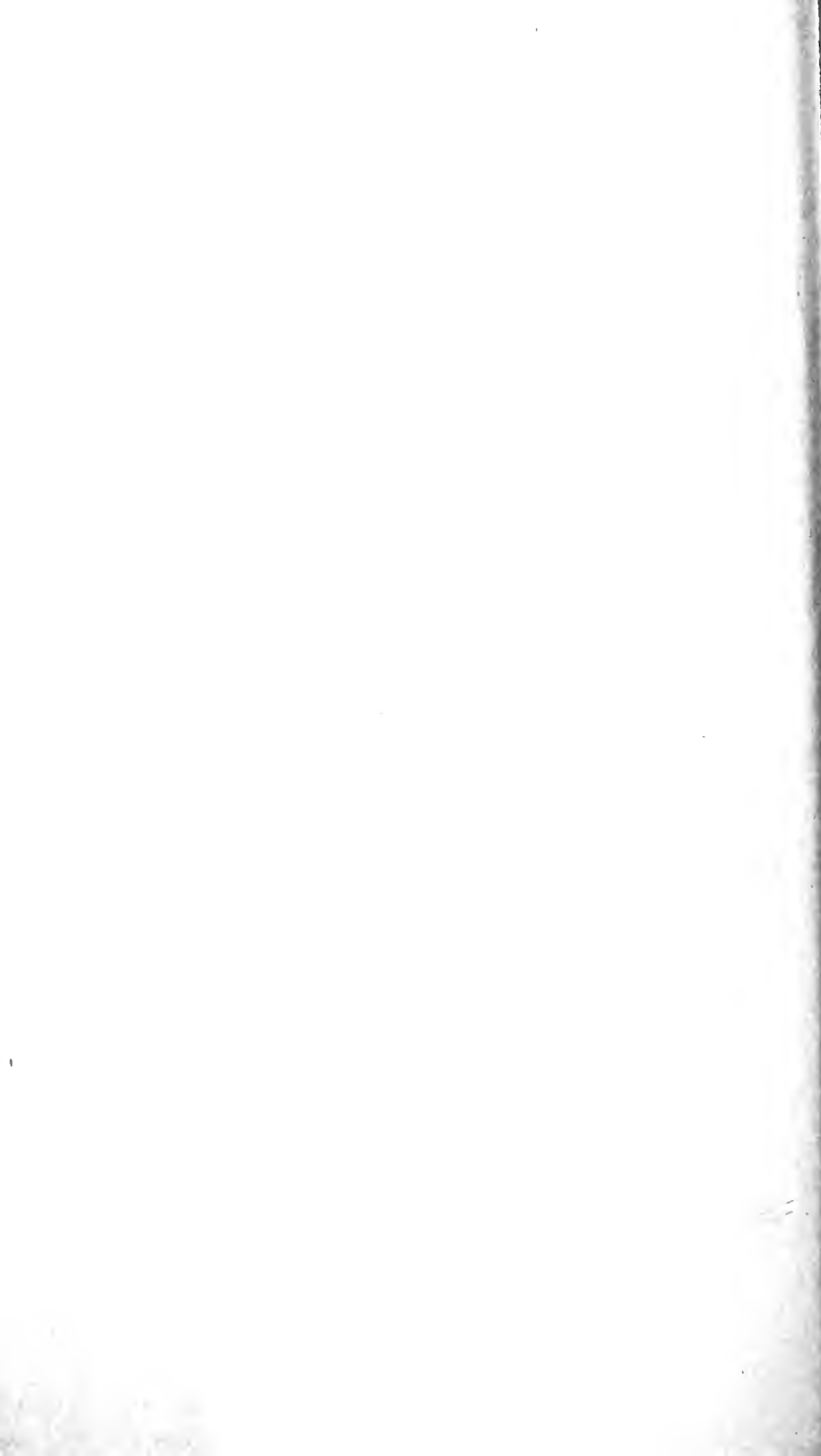
Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

P. O. Bldg., San Francisco, California,

Attorneys for Plaintiff and Appellee.



In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA, Plaintiff,

vs.

SHIRLEY KREMEN, aka LEE KAPLAN; PATRICIA JULIA BLAU, aka JANET CONROY; CARL EDWIN RASI, aka CARL ROSS and ROBERT EDWARD NEWMAN; SAMUEL IRVING COLEMAN, aka WILLIAM B. GORDON; SIDNEY STEINBERG, aka SID STEIN and JOSHUA NEWBERG, Defendants.

INDICTMENT

First Count: (Title 18 U.S.C. 3)

The Grand Jury charges:

1. That on or about the 14th day of October, 1949, Robert G. Thompson was convicted in the United States District Court for the Southern District of New York for the offense of wilfully and knowingly conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; the aforesaid being in violation of Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act.

2. That on or about the 27th day of August, 1953, in the Northern District of California, in the

vicinity of Twain Harte, Tuolumne County, California, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi, knowing that the offense aforesaid had been committed and that the said Robert G. Thompson had been convicted of committing the same, did receive, relieve, comfort and assist the said Robert G. Thompson in order to hinder and prevent his apprehension and punishment.

Second Count: (Title 18 U.S.C. 371)

The Grand Jury further charges:

1. That at a time and place to the Grand Jury unknown, in the Northern District of California and elsewhere, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi, unlawfully, wilfully and knowingly did conspire with each other and with divers other persons to the Grand Jury unknown.

2. That the object of this conspiracy was to commit, in violation of Section 3 of Title 18 United States Code, the offense of receiving, relieving, comforting and assisting Robert G. Thompson, in order to hinder and prevent the apprehension and punishment of the said Robert G. Thompson, while the said defendants well knew that the said Robert G. Thompson had violated Sections 2, 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act.

3. That in pursuance of said conspiracy and to effect the object thereof in the Northern District of

California, one or more of the defendants herein did further the said conspiracy by the following acts:

Overt Acts

(1) On or about the 20th day of June, 1953, in the office of Morrow Realty Company at Twain Harte, California, the defendant Shirley Kremen, while using the name Lee Kaplan, had a conversation with James Morrow concerning the leasing of a cabin located in the vicinity of Twain Harte, California, and owned by Charles E. Germany.

(2) On or about the 25th day of June, 1953, the said defendant Shirley Kremen, using the name Lee Kaplan, signed a lease for the said cabin at the Morrow Realty Company, Twain Harte, California.

(3) On or about the 1st day of August, 1953, the defendant Sidney Steinberg, while using the name Joshua Newberg, had a conversation with the said Charles E. Germany and Mrs. Velma L. Germany at the said cabin located in the vicinity of Twain Harte, California, and owned by the said Charles E. Germany.

(4) On or about the 6th day of August, 1953, at the San Jose Ford Sales Company, 375 South Market Street, San Jose, California, the defendant Patricia Julia Blau, while using the name Janet Conroy, purchased from Walter J. Olson a 1950 Ford Automobile, California License No. 3G1606.

(5) On or about the 13th day of August, 1953, at the said cabin, the defendant Sidney Steinberg, while using the name Joshua Newberg, had a conversation with the said Charles E. Germany and the

said Velma L. Germany in the presence of Carl Edwin Rasi.

(6) On or about the 20th day of August, 1953, defendant Patricia Julia Blau, using the name Janet Conroy, negotiated a check with Mrs. Vida Westfall at the Twain Harte Market, Twain Harte, California.

(7) On or about the 27th day of August, 1953, the defendants, Shirley Kremen, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi occupied the said cabin with Robert G. Thompson.

Third Count: (Title 18 U.S.C. 1071)

The Grand Jury further charges:

That on or about the 27th day of August, 1953, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman and Carl Edwin Rasi, with notice and knowledge of the fact that a warrant had been issued for the apprehension of Sid Stein, also known and named herein as Sidney Steinberg, did, in the Northern District of California, in the vicinity of Twain Harte, Tuolumne County, California, harbor and conceal, so as to prevent his discovery and arrest, the said Sid Stein, also known and named herein as Sidney Steinberg, for whose arrest a warrant had been issued pursuant to law by the United States District Court for the Southern District of New York.

Fourth Count: (Title 18 U.S.C. 371)

The Grand Jury further charges:

1. That at a time and place to the Grand Jury unknown, in the Northern District of California

and elsewhere, defendants Shirley Kremen, Carl Edwin Rasi, Patricia Julia Blau and Samuel Irving Coleman, unlawfully, wilfully and knowingly did conspire with each other, with Robert G. Thompson, named herein as co-conspirator but not as a defendant, and with divers other persons to the Grand Jury unknown.

2. That the object of this conspiracy was to commit, in violation of Section 1071 of Title 18 United States Code, the offense of harboring and concealing, so as to prevent his discovery and arrest, Sidney Steinberg, while said defendants well knew that a warrant for his arrest, under the name of Sid Stein, had been issued on the 20th day of June, 1951, pursuant to law by the United States District Court for the Southern District of New York.

3. That in pursuance of said conspiracy and to effect the object thereof, in the Northern District of California, one or more of the defendants herein and Robert G. Thompson named herein as a co-conspirator but not as a defendant, did further the said conspiracy by the following acts:

Overt Acts

(1) On or about the 20th day of June, 1953, at Twain Harte, California, in the office of Morrow Realty Company, defendant Shirley Kremen, using the name Lee Kaplan, had a conversation with James Morrow concerning the leasing of a cabin located in the vicinity of Twain Harte, California, and owned by Charles E. Germany.

(2) On or about the 25th day of June, 1953, the

said defendant Shirley Kremen, using the name Lee Kaplan, signed a lease for the said cabin at the Morrow Realty Company, Twain Harte, California.

(3) On or about the 6th day of August, 1953, at the San Jose Ford Sales Company, 375 South Market Street, San Jose, California, the defendant Patricia Julia Blau, while using the name Janet Conroy, purchased from Walter J. Olson a 1950 Ford Automobile, California License No. 3G1606.

(4) On or about the 13th day of August, 1953, at the said cabin, defendant Carl Edwin Rasi, was present at a conversation between Sidney Steinberg and the said Charles E. Germany and Mrs. Velma L. Germany.

(5) On or about the 20th day of August, 1953, defendant Patricia Julia Blau, using the name Janet Conroy, negotiated a check with Mrs. Vida Westfall at the Twain Harte Market, Twain Harte, California.

(6) On or about the 27th day of August, 1953, defendants Shirley Kremen, Carl Edwin Rasi, Samuel Irving Coleman, and Robert G. Thompson, named as co-conspirator but not as a defendant, occupied the said cabin with Sidney Steinberg.

A True Bill.

/s/ ROBERT JUN,

Foreman

/s/ LLOYD H. BURKE,

United States Attorney

Approved as to Form: Signed R. H. F.

Indictment: (Violation: Title 18 USC 3—Accessory after the fact; Title 18 USC 371—Conspiracy; Title 18 USC 1071—Harboring).

Penalty: First Count: Imprisonment not to exceed 5 years; fine not to exceed \$5,000. Second Count: Imprisonment not to exceed 5 years; fine not to exceed \$10,000. Third Count: Imprisonment not to exceed 6 months; fine not to exceed \$1,000. Fourth Count: Imprisonment not to exceed 6 months; fine not to exceed \$1,000.

Bail: Kremen, \$7,500; Blau, \$5,000; Rasi, \$10,000; Coleman, \$10,000; Steinberg, \$35,000.

[Endorsed]: Filed September 16, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants above-named and each of them move the above-entitled Court for its order dismissing the indictment herein and each count thereof upon each and all of the following grounds:

First Count

1. The first count of the indictment does not state facts sufficient to constitute an offense against the United States in that, among other things:

(a) It fails to allege that Robert G. Thompson was convicted of an offense against the United States.

(b) It fails to allege that Robert G. Thompson

was committing any offense against the United States on or about the 27th day of August, 1953; and it fails to allege that Robert G. Thompson had at any time committed any of the offenses against the United States described in, or embraced within the provisions of, Title 18 U.S.C. 1073.

(c) It fails to allege facts showing how the defendants or any of them knew that Robert G. Thompson had committed an offense against the United States.

(d) It fails to allege facts showing how the defendants or any of them received, relieved, comforted, and assisted Robert G. Thompson.

(e) It fails to allege facts showing how the defendants or any of them hindered or prevented the apprehension and punishment of Robert G. Thompson.

2. The first count of the indictment is so vague and indefinite and so lacking in essential facts as to fail to advise the defendants and each of them of the nature and cause of the accusation against them and each of them in each and every of the particulars set forth above.

3. The first count of the indictment is materially at variance with the statute upon which it is purportedly based (Title 18 U.S.C. 3) in that said count fails to allege that Robert G. Thompson had committed "an offense against the United States".

4. That statute upon which the first count of the indictment is purportedly based (Title 18 U.S.C. 3) is so vague and indefinite and lacking in prior ascertainable standards of guilt as to be unconstitu-

tional on its face; furthermore, said statute, as applied to the defendants and each of them in this case, deprives them and each of them of due process of law, contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

5. The statute upon which the first count of the indictment is purportedly based (Title 18 U.S.C. 3) as applied to the defendants and each of them in this case is a deprivation of the right to political association guaranteed to them and each of them by the First, Ninth and Tenth Amendments to the Constitution of the United States.

6. And for such other grounds as may appear on the face of the indictment and may be argued at the hearing on the within motion.

Second Count

1. The defendants and each of them make part hereof and incorporate herein by reference Paragraphs 1, 2, 3, 4, 5, and 6 directed to the first count of the indictment, and move that the second count of the indictment be dismissed upon each and all of the grounds set out in those paragraphs.

2. The second count of the indictment was not found within three years next after the alleged offense was committed.

Third Count

1. The third count of the indictment does not state facts sufficient to constitute an offense against the United States in that, among other things;

(a) It fails to allege that a warrant had been

issued for the arrest of said Sid Stein under the provisions of any law.

(b) It fails to allege the law, if any, pursuant to which a warrant had been issued for the arrest of Sid Stein.

(c) It fails to allege that Sid Stein was committing any offense against the United States on or about August 27, 1953; and it fails to allege that Sid Stein had committed any of the offenses against the United States described in, or embraced within the provisions of, Title 18 U.S.C. 1073.

(d) It fails to allege facts showing how the defendants or any of them had notice and knowledge that a warrant had been issued for the arrest of Sid Stein.

(e) It fails to allege facts showing how the defendants or any of them harbored or concealed Sid Stein.

(f) It fails to allege facts showing how the defendants or any of them prevented the discovery and arrest of Sid Stein.

2. The third count of the indictment is so vague and indefinite and so lacking in essential facts as to fail to advise the defendants and each of them of the nature and cause of the accusation against them and each of them in each and every of the particulars set forth above.

3. The third count of the indictment is materially at variance with the statute upon which it is purportedly based (Title 18 U.S.C. 1071) in that said

count fails to allege that a warrant had been issued for the arrest of Sid Stein "under the provision of any law".

4. The statute upon which the third count of the indictment is purportedly based (Title 18 U.S.C. 1071) is so vague and indefinite and so lacking in prior ascertainable standards of guilt as to be unconstitutional on its face; furthermore, said statute, as applied to the defendants and each of them in this case, deprives them and each of them of due process of law, contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

5. The statute upon which the third count of the indictment is purportedly based (Title 18 U.S.C. 1071) as applied to the defendants and each of them in this case is a deprivation of the right to political association guaranteed to them and each of them by the First, Ninth and Tenth Amendments to the Constitution of the United States.

6. And for such other grounds as may appear on the face of the indictment and may be argued at the hearing on the within motion.

Fourth Count

1. Defendants and each of them make part hereof and incorporate herein by reference Paragraphs 1, 2, 3, 4, 5 and 6 directed to the third count of the indictment, and move that the fourth count of the indictment be dismissed on each and all of the grounds set out in those paragraphs.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN &
LEONARD

/s/ By NORMAN LEONARD,
Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

MOTION FOR DISCOVERY AND
INSPECTION

The defendants and each of them move, pursuant to Rule 16, F.R.Crim.P., for an order directing the United States Attorney to permit the defendants and each of them, or their counsel, within ten days of said order, or in no event less than thirty days before the trial of this cause, to inspect and copy or photograph all books, papers, documents or tangible objects obtained from or belonging to the defendants and each of them, or obtained from others by seizure or by process.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

The defendants and each of them move for an order directing the United States Attorney to furnish a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, and within ten days after the entry of the order therefor, with respect to the following matters:

1. With respect to Count One:

(a) How or in what manner did the defendants and each of them know or obtain knowledge that Robert G. Thompson had been convicted of committing an offense against the United States.

(b) How or in what manner did the defendants and each of them receive, relieve, comfort and assist Robert G. Thompson.

(c) How or in what manner did the defendants and each of them hinder or prevent the apprehension and punishment of Robert G. Thompson.

2. With respect to Count Two:

(a) Defendants and each of them make part hereof and incorporate herein by reference Paragraphs (a), (b), and (c) directed to the first count of the indictment, and move that a bill of particulars as therein requested be also furnished respecting the same matters insofar as the second count of the indictment is concerned.

(b) How or in what manner did the overt acts alleged further the conspiracy in the said second count alleged.

3. With respect to Count Three:

(a) How or in what manner did the defendants and each of them have notice or knowledge of the fact that a warrant had been issued for the apprehension of Sid Stein.

(b) How or in what manner did the defendants and each of them harbor and conceal Sid Stein.

(c) How or in what manner did the defendants and each of them prevent the discovery and arrest of Sid Stein.

4. With respect to Count Four:

(a) Defendants and each of them make part hereof and incorporate herein by reference Paragraphs (a), (b), and (c) directed to the third count of the indictment, and move that a bill of particulars as therein requested be also furnished respecting the same matters insofar as the fourth count of the indictment is concerned.

(b) How or in what manner did the overt acts alleged further the conspiracy in the said fourth count alleged.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

MOTION FOR THE ISSUANCE OF
PRETRIAL SUBPOENA

Defendants and each of them move, pursuant to Rule 17(c), F.R.Crim.P., for the issuance by a judge of this Court of a subpoena directed to the United States Attorney commanding him within ten days of service of the said subpoena, and in no event less than thirty days before the trial of this cause, to produce for the inspection of, and copying by, defendants and each of them and their counsel, all books, papers, documents and objects (except memoranda prepared by government counsel, documents or papers solicited by or volunteered to government counsel which consist of narrative statements or memoranda of interviews), obtained by government counsel in any manner other than by seizure or process (1) in the course of the investigation by the grand jury which returned the indictment herein; and (2) in the course of the government's preparation for the trial of this cause, and if such books, papers, documents or objects (a) have been presented to the grand jury; or (b) are to be offered as evidence upon the trial of the defendants and each of them under the indictment; or (c) prove, or tend to prove, any allegation or charge in the indictment, or disprove or tend to disprove any such allegation or charge.

Dated: This 22nd day of October, 1953.

Respectfully submitted,

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR THE RETURN OF SEIZED PROPERTY

To the Plaintiff Above-named, and to Lloyd H.
Burke, Esq., its Attorney:

Please Take Notice that defendants herein, through their counsel Gladstein, Andersen & Leonard, will move the above-entitled Court in the Master Calendar Department thereof, Hon. Michael J. Roche presiding, at the Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 8th day of February, 1954, at the hour of 10:00 o'clock a.m. of said day or as soon thereafter as counsel may be heard, for an order directing that all clothing, books, papers, documents, or other tangible objects obtained from the possession of the defendants Shirley Kremen, Carl Edwin Rasi, Samuel Irving Coleman and Sidney Steinberg in the cabin located in the vicinity of Twain Harte, Tuolumne County, California, be re-

turned to said defendants through their attorneys herein.

This motion will be made upon the affidavit of Sidney Steinberg, defendant herein, attached hereto, and upon all of the pleadings and proceedings heretofore had herein. The ground asserted is that the above-described search and seizure without a search warrant was unreasonable, illegal and void in violation of Articles IV and V of the United States Constitution.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By RICHARD GLADSTEIN,
Attorneys for Defendants

AFFIDAVIT FOR THE RETURN OF
SEIZED PROPERTY

State of California,
City and County of San Francisco—ss.

Sidney Steinberg, being first duly sworn, deposes and says:

He is a defendant in the above-entitled action and respectfully makes the within application on behalf of himself and defendants Shirley Kremen, Carl Edwin Rasi, and Samuel Irving Coleman that the property seized by certain agents of the Federal Bureau of Investigation whose true names are unknown to these defendants, in the course of a search of a certain cabin located in the vicinity of Twain Harte, Tuolumne County, California, after an ar-

rest by said agents of the defendants herein, be returned to the attorneys for defendants herein.

On the 27th day of August, 1953, affiant was arrested at the above-mentioned cabin together with all the defendants herein except defendant Patricia Janet Blau. Subsequently all the defendants herein were charged with a violation of Title 18 U.S.C. §3. All of the defendants herein, except affiant, were also charged with a violation of 18 U.S.C. §1071.

The aforesaid agents seized items including, but not limited to, clothing, books, papers, documents and other tangible objects. A few items have been returned to defendants above-named.

The property seized was in no way connected with the crime alleged in this action. The items seized were neither the instrumentalities or means by which the offenses alleged herein were allegedly committed, nor property the possession of which is criminal, nor the fruits of the offenses herein alleged.

The aforesaid search and seizure was made by certain of said agents against the will of the defendants above-named and out of their presence. No search warrant was served or displayed by the said agents.

The aforesaid search and seizure was unwarranted and illegal in that it violates the Fourth Amendment to the Constitution of the United States, and the retention of any property seized infringes upon the privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States.

Your affiant is informed and believes and therefore asserts upon such information and belief that the aforesaid agents had ample time to secure search warrants prior to the arrests made in this action, if any legal basis therefor existed.

Wherefore, affiant respectfully prays for an order that all property taken and seized from the above-named defendants as the result of the search of the aforesaid cabin by said agents be returned to the above-named defendants through their attorneys herein.

/s/ SIDNEY STEINBERG

Subscribed and sworn to before me this 3rd day of February, 1954.

[Seal] /s/ PEARL STOCKWELL,
Notary Public in and for the City and County of
San Francisco, State of California.

Acknowledgment of Service attached.

[Endorsed]: Filed February 4, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR THE RETURN OF
SEIZED PROPERTY AND ITS SUPPRES-
SION AS EVIDENCE

To the Plaintiff above-named, and to Lloyd H.
Burke, its Attorney:

Please Take Notice that defendant Shirley Kremen, through her counsel, Gladstein, Andersen & Leonard, will move the above-entitled Court in the Master Calendar Department thereof, Hon. Michael J. Roche presiding, at the Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 5th day of April, 1954, at the hour of 10:00 o'clock a.m. of said day or as soon thereafter as counsel may be heard, for an order directing that certain property, to-wit: all money, clothing, books, papers, documents or other tangible objects which were taken on or about the 27th day of August, 1953, from a certain residence located in the vicinity of Twain Harte, Tuolumne County, California, which said residence was then and there leased to defendant Shirley Kremen under the name of Lee Kaplan be returned to said defendant Shirley Kremen through her attorneys herein and be suppressed as evidence in this proceeding as against the defendants or any of them.

This motion will be made upon evidence to be adduced at the time of hearing on this motion, upon the memorandum of points and authorities submitted herewith, and upon all of the pleadings, rec-

ords, and files herein. The grounds asserted are that the search and seizure of the above-described property were made pursuant to an illegal arrest; against the will and without the consent of defendant Shirley Kremen or any of the above-mentioned defendants; without either a search warrant or any other authority, and were unreasonable, illegal and void in violation of Articles IV and V of the United States Constitution.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By RICHARD GLADSTEIN,
Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR THE RETURN OF
SEIZED PROPERTY AND ITS SUPPRES-
SION AS EVIDENCE

To the Plaintiff above named, and to Lloyd H.
Burke, Esq., its Attorney:

Please Take Notice that defendants herein, through their counsel, Messrs. Gladstein, Andersen & Leonard, will move the above-entitled Court in the Master Calendar Department thereof, Honorable Michael J. Roche presiding, at the Post Office Building, Seventh and Mission Streets, San Fran-

cisco, California, on the 5th day of April, 1954, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel may be heard, for an order directing that all clothing, books, papers, documents, or other tangible objects obtained from the possession of defendant Patricia Julia Blau in the automobile referred to in the affidavit of said defendant Blau, attached hereto, be returned to said defendant Blau through her attorneys herein, and that said property be suppressed as evidence in any criminal proceeding.

This motion will be made upon the affidavit of Patricia Julia Blau, defendant herein, attached hereto, and upon all of the pleadings and proceedings heretofore had herein. The ground asserted is that the above-described search and seizure without a search warrant was not pursuant to a legal arrest and was unreasonable, illegal and void in violation of Articles IV and V of the United States Constitution.

GLADSTEIN, ANDERSEN &
LEONARD

/s/ By RICHARD GLADSTEIN,
Attorneys for Defendants

AFFIDAVIT FOR THE RETURN OF SEIZED PROPERTY

State of California,
County of Los Angeles—ss.

Patricia Julia Blau, being first duly sworn, deposes and says:

She is a defendant in the above-entitled action and respectfully makes the within application so that the search of a certain automobile made in the above-entitled action be declared unreasonable, illegal and void, and that the United States attorney be precluded from using the evidence against affiant.

On the 27th day of August, 1953, affiant was arrested approximately eight and one-half miles south of the City of Stockton, County of San Joaquin, State of California. In connection with that arrest, affiant has been charged with violations of Title 18 U.S.C. §§ 3 and 1071.

Said arrest was made by agents of the Federal Bureau of Investigation whose true names are unknown to your affiant. Your affiant was then and there the occupant of the aforesaid automobile, which said agents searched. Said agents seized and took into their custody certain of the contents of said automobile. The aforesaid agents have not returned certain items of seized property including, but not limited to, clothing, books, papers, documents and tangible objects which the said automobile contained. No search warrant was served or displayed by the aforesaid agents making the search, and the search was conducted over the protest and against the will of affiant.

The aforesaid search and seizure was unwarranted and illegal in that it violates the Fourth Amendment to the Constitution of the United States, and the retention of any property seized infringes upon the privilege against self-incrimina-

tion as guaranteed by the Fifth Amendment to the Constitution of the United States.

Your affiant is informed and believes and therefore asserts upon such information and belief that the aforesaid agents had ample time to secure search warrants prior to the arrests made in this action, if any legal basis therefor existed.

Wherefore, affiant respectfully prays for an order that all property taken and seized from the above-named defendants as the result of the search of the aforesaid automobile by said agents be returned to affiant through her attorneys herein.

PATRICIA JULIA BLAU

Subscribed and sworn to before me this 8th day of February, 1954.

[Seal] /s/ J. ALLAN FRANKEL,
Notary Public in and for the City and County of
Los Angeles, State of California.

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

ORDER

Defendants have petitioned the Court to order the return of property seized by United States agents while engaged in lawfully arresting defendants. The government agents conducted the search and seizure without first obtaining a search warrant. The United

States moved to have the Court strike the Motion to Return on the ground that it did not state enough facts to establish a basis for relief. Defendants' motion is supported only by one affidavit filed and signed by defendant Sidney Steinberg on behalf of himself and defendants Kremen, Rasi and Coleman. Affiant does not allege that he owned or otherwise lawfully occupied the premises searched; nor does he identify the items of property seized, if any, which he, rather than the other defendants or third parties, owned or had in his possession.

It is elementary that the Fourth Amendment may be invoked only by one whose rights are violated. Accordingly, defendant Steinberg may complain of a search and seizure only if his abode was searched and his property seized. *United States vs. Jeffers*, 342 U. S. 48 (1951). Moreover, the Court is unwilling to accept an affidavit made by defendant Steinberg in support of alleged Constitutional violations suffered by the other defendants.

Defendants, in support of their motion, rely strongly upon the case of *United States vs. Lerner*, 100 F. Supp. 765 (1951) decided by this Court. Their reliance is misplaced. That case is distinguishable. It arose on a motion to suppress certain evidence. The Court there had the benefit of testimony, rather than mere affidavits, which established that Lerner was the sole, lawful tenant of the premises searched and that the property seized was in Lerner's possession. If the search was unlawful, therefore, Lerner was the one entitled to complain.

Defendants' counsel moreover contends that the

defendants cannot make the requisite showing because the Government has in its possession the only list of property seized in the course of making the arrest. There is some merit in that contention. The Federal Bureau of Investigation, the seizing agency, made a detailed summary of the property seized. Upon the Government's admission that the summary contained no information, the divulgence of which would endanger the security of the United States, the Court is of the view that the summary should be made available to defendants in order to refresh their recollection should they choose to renew this motion buttressed by a proper showing.

The Court expresses no opinion at this juncture as to the legality of the search and seizure nor whether a Motion To Return could in a case like this be considered by the Court upon mere affidavits rather than upon evidence.

Defendants' motion is denied. The Government's motion is granted. Defendants may, upon demand, have a copy of the summarized list of items seized, consisting of twenty-five (25) pages, which was sent to the United States Attorney for the Northern District of California with a cover sheet bearing the date of February 8, 1954 and the signature of William M. Whelan, Special Agent in Charge.

So Ordered.

Dated: February 9th, 1954.

/s/ EDWARD P. MURPHY,
United States District Judge

[Endorsed]: Filed February 9, 1954.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED INSTRUCTIONS

Defendants' Proposed Instruction No.....

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations of the indictment filed in this court and the defendants' pleas of "not guilty". This duty you should perform uninfluenced by pity for the defendants or by passion or prejudice against them. You must not suffer yourselves to be biased against the defendants because of the fact that he or she has been arrested for this offense, or because an indictment has been filed against him or her, or because he or she has been brought before the court to stand trial. None of these facts is evidence of their guilt, and you are not permitted to infer or to speculate from any or all of them that he or she is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the prosecution and the defendants have a right to demand, and they do demand and expect, that you will conscienti-

ously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences of such verdict may be. That verdict must express the individual opinion of each juror.

CALJIC 1.

People vs. Worden, 113 Cal. 569, 45 P. 844.

People vs. Powell, 83 Cal.App. 62, 256 P. 561.

Defendants' Proposed Instruction No.

You are hereby instructed that in the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed.

Thus in the crime charged in the first count of the indictment herein a necessary element is the existence in the minds of the defendants of the specific intent to hinder and prevent the apprehension and punishment of Robert G. Thompson, and unless such intent so exists, the crime so charged is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.

In this case the prosecution relies upon circumstantial evidence. I instruct you that where reliance is placed by the prosecution on circumstantial evidence, the circumstances that have been shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence, be-

fore you are permitted to convict. In other words, if after a full consideration of the evidence, you find that the circumstances relating to any particular defendant or defendants are such that they are consistent with any one or more possible and reasonable hypotheses or suppositions of innocence, then it is your duty to acquit such defendant or defendants of the charge.

Paddock vs. United States, 79 F.2d 872, 876 (CCA 9, 1935).

Defendants' Proposed Instruction No.....

Before you can find any defendant guilty you must be satisfied beyond reasonable doubt from the evidence that it has been shown that such defendant had specific knowledge of the fugitive status of any alleged fugitive, and that such person was a fugitive from federal process issued under a particular federal statute. It is not enough for the prosecution to show that the conduct or state of mind of some defendant exhibits general malevolence. Nor is it enough for the prosecution to show suspicious circumstances, or even knowledge on the part of a defendant, that the alleged fugitives were evading officers in general. Before a defendant can be convicted, it must be shown from the evidence that such defendant had knowledge that the person charged with being a fugitive was wanted by the federal authorities for the violation of some particular statute.

Fulbright vs. United States, 91 F.2d 210 (CCA 8, 1937).

Defendants' Proposed Instruction No.....

I instruct you that the words "harbor" or "conceal" are active verbs which have the fugitive as their object. Passive conduct on the part of any defendant would therefore not measure up to the requirement of harboring or concealing.

Also, not every piece of active conduct on the part of a defendant in relationship to an alleged fugitive would constitute harboring or concealing. In other words, the law involved in this case does not prohibit every form of assistance to a fugitive. Being in the fugitive's presence, or indeed giving him various forms of assistance, would by themselves not constitute a violation of the law. For example, making a payment of money to a fugitive, which is to be used by the fugitive in any way which he may choose, does not constitute a concealment or harboring within the meaning of the statute.

United States vs. Shapiro, 113 F.2d 891 (CCA 2, 1940).

Defendants' Proposed Instruction No.....

Under the statute here involved, it is not a criminal offense for a defendant to remain silent after knowledge of the commission of the crime of a fugitive. The defendants are not being charged, and it would not be proper for you to find them guilty, of a failure to report or denounce any alleged fugitive. Before any of them can be found guilty in this case, you must find in accordance with my instructions and based upon the evidence, that some af-

firmative act or acts were committed toward the concealment of the alleged offender.

United States vs. Farrar, 38 F.2d 515 (DC Mass., 1930).

Defendants' Proposed Instruction No.....

Under the law involved in this case, an accessory after the fact is a person who, knowing that a criminal offense has been committed, receives, relieves, comforts or assists the guilty person in order to hinder his apprehension, trial or punishment. However, I charge you that this statute defining accessory after the fact is not the same as the statute on harboring and concealment, and that the two offenses are separate and distinct. In the case of accessories after the fact, the acts of Robert Thompson, alleged to be the principal, in committing the substantive offense alleged in this case, and the acts of an accessory after the fact thereto, are one continuous criminal transaction. Therefore the acts of the two—that is the principal and the accessory, constitute a single offense committed by them jointly, one acting as principal and the other as accessory after the fact.

If therefore, you find that any defendant has not conducted himself in such a manner as to participate with Robert Thompson in the commission of the substantive offense of which he was charged and convicted, then you may not find such defendant guilty of being an accessory after the fact thereto.

Skelly vs. United States, 76 F.2d 483 (CCA 10, 1935).

Defendants' Proposed Instruction No.....

In order to make out the offense of harboring, as that term is used in this statute, it is necessary that the person charged be shown to have provided shelter or other assistance in a clandestine manner, and with the intent and for the purpose stated to you.

In order to make out a case of concealment, as that term is used in the statute, it is necessary for the prosecution to prove conduct on the part of a defendant that shows that such defendant tried to shield the alleged fugitive from observation and to prevent the discovery of such fugitive.

Susnjar vs. United States, 27 F.2d 223 (CCA 6, 1928).

Defendants' Proposed Instruction No.....

I instruct you that the mere act of giving shelter to a fugitive does not in and of itself constitute a concealment or harboring in violation of the law, unless the person providing the shelter has knowledge of the fugitive status of the fugitive, and participates in conduct that shows surreptitious concealment of the fugitive.

United States vs. Mack, 112 F.2d 290 (CCA 2, 1940).

Defendants' Proposed Instruction No.....

To harbor or conceal a fugitive in violation of the statute, the act or acts done must evince an intention to elude the vigilance of the law or its agents, and the act done must be calculated to attain that object. Merely to relieve the hunger of a fugitive

would not constitute a violation of the statute, unless accompanied by acts showing a determination to disregard the law in the manner I have outlined to you. Treating a fugitive on the ordinary principles of humanity, such as conversing with him or relieving his hunger or thirst, or in administering to his comfort, does not in and of itself constitute a violation of law. It is only when such conduct, taken with other evidence and all of the circumstances of the case, are so marked in character as to show both an intention to elude the vigilance of the law and a calculation to attain such an object, that a concealment or harboring may be found in violation of the statute.

Jones vs. Van Zandt, 13 F.Cas. 1040, 1043, 1044,
No. 7501.

Defendants' Proposed Instruction No.....

I have instructed you that it is necessary, before you can find any defendant guilty of the charge of conspiracy, that the prosecution shall have proved to your satisfaction and beyond reasonable doubt that at least one overt act was committed which was in furtherance of the alleged conspiracy. An overt act which is not in furtherance of the alleged conspiracy will not support a conviction. In other words, before a conspiracy can be supported by any evidence of overt act, it must be shown to you that such overt act was such as to convince you that it was intended and calculated by such overt act to elude the vigilance of the law.

Jones vs. Van Zandt, 46 U.S. 215.

Defendants' Proposed Instruction No.....

As used in the statutes involved in this case, the word "conceal" means to hide, to secrete, or to keep out of sight. Therefore, the mere presence of a fugitive in one's home, or the mere association between a defendant and a fugitive, does not constitute concealment, unless you find from the evidence that such defendant engaged in conduct constituting a hiding or secreting of the fugitive, or keeping him out of sight.

The word "harbor" as used in the statute involved in this case means to give lodging and care to a fugitive after secreting him. In other words, some physical act tending to the secretion of the body of the fugitive is essential before the offense of harboring or concealment can be made out.

It is also necessary that it be shown that such acts of concealment or harboring, if any you find, were committed knowingly and wilfully for the purpose of bringing about such concealment, with the intent to shield the fugitive from the law, and only after knowledge of the existence of the person concealed as a fugitive from justice.

Firpo vs. United States, 261 U.S. 850, (CCA 2, 1919).

Defendants' Proposed Instruction No.....

Like every other case tried in a court of justice, this one should be decided according to the law and the evidence. It cannot be disguised that the subject of Communism is at this time a fruitful source of public agitation. Indeed, it has become a chief ele-

ment of political excitement in our country. Whatever may be your individual views of this subject, it is clear that you will best acquit yourselves of the responsibility now resting upon you, by taking care that the rights of the parties to this action are in no way affected by the existing state of public feeling on the question of Communism.

Driskill vs. Parrish, 7 F.Cas. 1100, No. 4089.

Defendants' Proposed Instruction No.....

I instruct you that the statutes involved in this case do not impose any obligation on any person whatever to aid or assist in the capture of a fugitive.

Driskill vs. Parrish, 7 F.Cas. 1095, No. 4088.

Defendants' Proposed Instruction No.....

To establish the charge of harboring and concealing against any particular defendant there must be satisfactory proof that he or she, with full knowledge that the person or persons harbored were fugitives, concealed them with the intent to elude the vigilance of the law and to defeat the law's claim.

Driskill vs. Parrish, 7 F.Cas. 1093, No. 4087.

Defendants' Proposed Instruction No.....

I instruct you that mere association with a conspirator or conspirators in matters not connected with the unlawful undertaking charged in the indictment does not make such a person a conspirator, even though he or she may know that an unlawful

undertaking is in the making with those with whom he associates. The crime of conspiracy requires that two or more persons combine or confederate with each other for the particular purpose of committing a public offense. Therefore mere association between a defendant and a conspirator does not make such defendant guilty, even though such defendant knows that the conspirator is engaged in unlawful activities. It is only when a defendant associates with a conspirator for the purpose of committing a public offense, and engages in conduct calculated to achieve an unlawful objective, that such a defendant may be found guilty of the offense of conspiracy.

Butler vs. United States, 197 F.2d 561, 564 (CCA 10, 1952).

Defendants' Proposed Instruction No.....

The word "knowingly," as used in my instructions, imports only a knowledge of the existence of the facts in question, when those facts are such as bring the act or omission within the provision of the law. The word does not require in its meaning any knowledge of the unlawfulness of such act or omission.

CALJIC 76.

Defendants' Proposed Instruction No.....

In this case, you must decide separately the question of the innocence or guilt of each of the several defendants. If you cannot agree upon the innocence or guilt of all the defendants, but do agree as to the innocence or guilt of one or more of them, you must

render a verdict as to the one or more upon whose innocence or guilt you do agree.

CALJIC 93.

Defendants' Proposed Instruction No. . . .

Each count set forth in the indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendant. He may be convicted or acquitted upon any or all of the offenses charged, depending upon the evidence and the weight you give to it, under the court's instructions.

CALJIC 112.

Defendants' Proposed Instruction No. . . .

The word "wilfully", when applied to the intent with which an act is done or omitted and as used in my instructions, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.

CALJIC 75.

People vs. O'Brien, 96 Cal. 171, 176, 31 P. 45, 46, 47.

People vs. Settles, 29 Cal.App. 2d 781, 785, 78 P.2d 274, 276.

Green vs. Stewart, 106 Cal.App. 518, 528, 289 P. 940, 944.

People vs. Westmire, 71 A.C.A. 573, 162 P.2d 988.

Defendants' Proposed Instruction No.....

In every crime or public offense there must exist a union or joint operation of act and intent. To constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive.

CALJIC 71.

People vs. McClennege, 195 Cal. 445, 234 P. 91.

People vs. Gonzales, 74 Cal.App. 341, 240 P. 291.

People vs. Womble, 67 Cal.App. 2d 885, 155 P.2d 838.

Defendants' Proposed Instruction No.....

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard

any such opinion, if you find it to be unreasonable.

CALJIC 56.

People vs. Williamson, 134 Cal.App. 775, 780,
26 P.2d 681, 683.

People vs. Brac, 73 A.C.A. 711, 167 P.2d 535.

Defendants' Proposed Instruction No.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

CALJIC 53.

Huddy vs. Chronicle Publishing Co., 15 Cal. 2d
554, 103 P.2d 421.

Defendants' Proposed Instruction No.

You are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence; by the manner of the

witness on the stand, the degree of intelligence exhibited by him, and the manner in which he testifies; by the character of his testimony; by evidence showing his motives, an interest in the outcome of the case, or bias or prejudice against one of the parties; by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony.

CALJIC 52.

People vs. Amaya, 134 Cal. 531, 539, 66 P. 694, 797.

Defendants' Proposed Instruction No.....

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus whether or not he does testify rests entirely in his own decision. In deciding whether or not to testify the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the prosecution to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the prosecution so as to support by itself a finding against him on any such essential element. The failure of a defendant to deny or explain evidence against him does not create any presumption of guilt, and it does not by itself warrant any inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime, and the guilt of the defendant beyond a reasonable doubt.

Defendants' Proposed Instruction No.

In the trial of this case there were instances when certain evidence was admitted as against one or more of the defendants, but denied admission as against others; and there were instances when certain evidence was admitted in favor of one or more of the defendants, but denied admission in favor of others.

It may be difficult for you, when considering the case for or against any one certain defendant, to disregard completely any evidence that was admitted only as to another, but that is your plain duty with respect to evidence not admitted by the Court as against or in favor of a certain defendant, and you must try conscientiously to so treat such a situation.

CALJIC 39.

Defendants' Proposed Instruction No.

I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendants guilty of any crime charged against them unless the proved circumstances not only are consistent with the hypothesis that the defendants are guilty of the crime, but are irreconcilable with any other rational conclusion. In other words, if, on your consideration of the entire case the evidence is consistent with the hypothesis that any one or more of the defendants was innocent of any of the offenses charged against him or her, your verdict should be in favor of such defendant or defendants

as to each and every count concerning which you reach that conclusion.

CALJIC 29, as modified.

Defendants' Proposed Instruction No.....

If the evidence in this case as to any particular count is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendants, and the other to their innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendants' innocence, and reject that which points to his or her guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to a defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

CALJIC 26.

People vs. Clark, 145 Cal. 727, 728, 79 P. 434.

People vs. Newland, 15 Cal. 2d 678, 104 P.2d 778.

People vs. Ratterman, 38 Cal.App. 2d 598, 600, 101 P.2d 750, 751.

People vs. Hatchett, 63 Cal.App. 2d 144, 146 P.2d 469.

People vs. Nunn, 65 Cal.App. 2d 188, 150 P.2d 476.

People vs. Rayol, 65 Cal.App. 2d 462, 150 P.2d 812.

People vs. Blanks, 67 Cal.App. 2d 132, 153 P.2d 449.

Defendants' Proposed Instruction No.....

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence.

CALJIC 23.

People vs. Powell, 83 Cal.App. 62, 67, 68, 256 P. 561, 563, 564.

Defendants' Proposed Instruction No.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. However, the effect of this presumption is only to place upon the prosecution the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human af-

fairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

CALJIC 21.

People vs. McEvers, 53 Cal.App. 2d 448, 128 P.2d 93.

People vs. Matthai, 135 Cal. 442, 67 P. 694.

People vs. Soldavini, 45 Cal.App. 2d 460, 114 P.2d 415.

Defendants' Proposed Instruction No.....

The Court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

CALJIC 8.

People vs. Clark, 70 Cal.App. 531, 233 P. 980.

People vs. Casey, 79 Cal.App. 295, 249 P. 525, rehearing denied 250 P. 653.

Defendants' Proposed Instruction No.....

I instruct you that in the case involving Robert Thompson in which he was convicted of a violation of the Smith Act, he was neither charged with nor convicted of any attempt to overthrow the government of the United States, nor of conspiring to do so. Neither was he charged with nor convicted of any overt act designed to overthrow the government of the United States, or conspiring to do so. Furthermore, he was not charged with saying anything or writing anything designed or calculated to overthrow the government. The charge against him is that he conspired with others to assemble and to talk and to publish certain ideas at a later date, which ideas would constitute an advocacy of the overthrow of the government.

I tell you these things in order to make clear to you what is involving in the charges contained in the first and second counts, relating to accessories after the fact. Before any defendant in this case can be convicted, under either the first or second count, you must be satisfied beyond a reasonable doubt from all the evidence, that such defendant or defendants conducted themselves in such manner as to become actual parties to the specific offense of which Thompson was convicted.

United States vs. Dennis, opinion of Justice
Black, 339 U.S. 162, 175.

Skelly vs. United States (CCA 10), 76 F.2d
483.

Defendants' Proposed Instruction No.....

The knowledge charged in this indictment is not that the defendants had knowledge that Robert Thompson had been convicted of an offense, but that they had knowledge that he actually had committed the offense of conspiracy to violate the Smith Act. I instruct you that unless the prosecution proves that a particular defendant knew that Thompson had actually committed the offense for which he was tried, then the requirement of the statute has not been made out. In other words, it is not enough to show that a defendant had knowledge that Thompson was convicted, for this is not the same as knowledge that Thompson was guilty. It is true that when a person is convicted, an inference may be drawn that he was guilty, but this does not necessarily follow. A person may in good faith believe that another has been unjustly convicted, and that the person convicted was actually innocent of the charge on which he was tried.

If, therefore, you find from the evidence in the case of any particular defendant or defendants, that the prosecution has not satisfied you beyond a reasonable doubt that such defendant or defendants knew, not merely that Thompson had been convicted, but that he was guilty of the offense charged against him, then a case has not been made out against such defendant or defendants.

Defendants' Proposed Instruction No.....

Concealing means the taking of active steps by the defendant to hide a fugitive from the police.

Harboring means caring for him after such concealment. Mere association with a fugitive, knowledge of his whereabouts, and failing or refusing to disclose this information, is not a violation of law.

In addition, it must be the defendant, not the fugitive, who does the concealing, and the concealing must be something more than the mere failure to reveal. In other words, if you find that a fugitive committed the acts of concealment or hiding, but that a defendant did not, the offense would not be made out against such defendant.

I also instruct you that mere knowledge that a person concealed is a so-called fugitive is not in and of itself enough. Before you can convict a defendant it is necessary to establish that he had notice or knowledge that a federal warrant for the arrest of the so-called fugitive had been issued.

Defendants' Proposed Instruction No.....

“Circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicion or conjecture cannot take the place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had. Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful

agreement and participation therein, with knowledge of the agreement.

“Presumption cannot be based upon another presumption, but only upon facts. It is not necessary that all of the alleged conspirators should have been such from the beginning of the conspiracy. There may be a subsequent joining; but a person, to be held as subsequently joining a conspiracy, must be shown to have had knowledge of the conspiracy at the time of joining, and to have participated while having such knowledge.”

Dahly vs. United States (CCA 8), 50 F.2d 37, 42.

Defendants' Proposed Instruction No.....

On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: it is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

CALJIC 7-A.

Defendants' Proposed Instruction No.....

(Requested to be given only in the event that the Court comments upon the evidence, and then, if agreeable to the Court, this instruction to be given at the conclusion of the Court's comment on the evidence.)

As Judge of this Court, presiding at the trial of this action, I am authorized within proper bounds to comment to the jury on the credibility of any

witness and on any other phase of the evidence.

Under that authority, and with a view to aiding you in determining the facts, I have made certain statements concerning the evidence in this case.

However, I instruct you that the jury are the sole and exclusive judges of all questions of fact and of the credibility of each and every witness, and you are not to consider any comment which I have made on the evidence as binding upon you, or necessarily to be followed by you. I caution you that it is your right and duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of witnesses and the arguments of counsel. As Judge of this Court, I do not intend, nor desire, that my judgment shall be substituted for the judgment of the jury. My sole purpose in commenting on the evidence has been to express my personal thought on these matters for the sole purpose of assisting you in arriving at a verdict, but I particularly caution you that any such thought expressed by me shall not be used for the purpose of imposing my will upon you, or for the purpose of compelling a verdict. Your verdict should reflect your own sound judgment, and not that of the Court or myself as Judge thereof.

Accordingly, in the exercise of your own sound judgment, you are at liberty to disagree with any comment I have made upon the evidence, and to disregard such comment if you so see fit.

CALJIC 7, as modified.

People vs. Gosden, 6 Cal. 2d 14, 32.

Defendants' Proposed Instruction No.....

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered in evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

CALJIC 6.

Defendants' Proposed Instruction No.....

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

CALJIC 5.

Defendants' Proposed Instruction No.....

You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and afterwards was ordered by me to be stricken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any of his questions that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for all parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, any party has admitted a fact to be true, such admission may be considered by you as evidence in the case.

CALJIC 2.

Defendants' Proposed Instruction No.....

Each defendant in this case is individually entitled to, and must receive, your determination whether or not he was a member of the alleged conspiracy, if any existed, and as to each defendant you must determine whether or not he was a conspirator, as alleged, by deciding whether or not he wilfully, intentionally and knowingly joined with any other or others in an agreement or understanding having the elements of a criminal conspiracy as I have stated them to you.

CALJIC 944.

Defendants' Proposed Instruction No.....

No act or declaration of a conspirator that is a fresh and independent product of his own mind and is outside the common design and not in furtherance of that design, is binding upon his co-conspirators, and they are not criminally liable for any such act or declaration.

CALJIC 943.

People vs. Werner, 16 Cal.2d 216, 105 P.2d 927.

People vs. Creeks, 170 Cal. 368, 149 P. 821.

People vs. Kauffman, 152 Cal. 331, 92 P. 861.

People vs. Smith, 151 Cal. 619, 91 P. 511.

People vs. Suter, 43 Cal.App. 2d 444, 111 P.2d 23.

People vs. Little, 41 Cal.App. 2d 797, 107 P.2d 634, 108 P.2d 63.

People vs. DiDonato, 90 Cal.App. 366, 265 P. 978.

Defendants' Proposed Instruction No.....

Evidence that a defendant was in the company of or associated with one or more other persons alleged or proved to have been members of a criminal conspiracy is not, in itself, sufficient to prove that such defendant was a member of the alleged conspiracy.

CALJIC 937-A.

Defendants' Proposed Instruction No.....

Neither the members of a conspiracy, if one existed, nor the persons charged with having belonged

to a conspiracy are bound by or liable for any act or declaration of a person who was not a member of the conspiracy, although the latter person may have performed an act or acts which tended to promote the object of the alleged conspiracy. Evidence of an act which furthered the execution of the design of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of such a conspiracy. Neither is evidence that such person or any person was in the company of or associated with one or more alleged conspirators, in itself, sufficient to prove that he was a member of the alleged conspiracy.

CALJIC 937.

People vs. Armentrout, 118 Cal.App.Supp. 761, 1 P.2d 556.

People vs. Yant, 26 Cal.App. 2d 725, 80 P.2d 506.

People vs. Weber, 7 Cal.App. 2d 620, 46 P.2d 222.

Defendants' Proposed Instruction No.....

Where a conspirator commits an act which is neither in furtherance of the object of the conspiracy nor the natural and probable consequence of an attempt to attain that object, he alone is responsible for and is bound by that act, and no responsibility therefor attaches to any of his confederates.

CALJIC 936.

People vs. Little, 41 Cal.App. 2d 797, 107 P.2d 634, 108 P.2d 63.

People vs. Gilliland, 39 Cal.App. 2d 250, 103 P.2d 179.

Defendants' Proposed Instruction No.....

No evidence of an act or declaration of an alleged conspirator shall be binding upon or considered against any other alleged conspirator unless and until, independent and without the aid of such evidence, a conspiracy as alleged, and of which both such persons were members, has been proved to have been in existence at the time of such act or declaration; and no alleged conspirator shall be held criminally responsible as such for any act of another alleged conspirator when the only substantial evidence purporting to indicate an agreement between them is evidence of the acts and declarations of the latter.

CALJIC 935.

People vs. Marvin, 48 Cal.App. 2d 180, 119 P.2d 413.

People vs. MacPhee, 26 Cal.App. 218, 146 P. 522.

Defendants' Proposed Instruction No.....

You are hereby instructed that with respect to the crime of conspiring to harbor and conceal Sidney Steinberg as charged in the fourth count of the indictment herein, a necessary element is the existence in the minds of the defendants of the specific intent to prevent the discovery and arrest of Sidney Steinberg, and unless such intent so exists, that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

You are hereby instructed that with respect to the harboring and concealing crime charged in the third count of the indictment, a necessary element is the existence in the minds of the defendants of the specific intent to prevent the discovery and arrest of Sidney Steinberg, and unless such intent so exists that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

In the crime charged in the second count of the indictment herein alleging a conspiracy on the part of the defendants to violate Section 3 of Title 18 of the United States Code, by receiving, relieving, comforting and assisting Robert G. Thompson, a necessary element is the existence in the minds of the defendants of the specific intent to hinder and prevent the apprehension and punishment of Robert G. Thompson, and unless such intent so exists that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to

People vs. Gilliland, 39 Cal.App. 2d 250, 103 P.2d 179.

Defendants' Proposed Instruction No.....

No evidence of an act or declaration of an alleged conspirator shall be binding upon or considered against any other alleged conspirator unless and until, independent and without the aid of such evidence, a conspiracy as alleged, and of which both such persons were members, has been proved to have been in existence at the time of such act or declaration; and no alleged conspirator shall be held criminally responsible as such for any act of another alleged conspirator when the only substantial evidence purporting to indicate an agreement between them is evidence of the acts and declarations of the latter.

CALJIC 935.

People vs. Marvin, 48 Cal.App. 2d 180, 119 P.2d 413.

People vs. MacPhee, 26 Cal.App. 218, 146 P. 522.

Defendants' Proposed Instruction No.....

You are hereby instructed that with respect to the crime of conspiring to harbor and conceal Sidney Steinberg as charged in the fourth count of the indictment herein, a necessary element is the existence in the minds of the defendants of the specific intent to prevent the discovery and arrest of Sidney Steinberg, and unless such intent so exists, that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

You are hereby instructed that with respect to the harboring and concealing crime charged in the third count of the indictment, a necessary element is the existence in the minds of the defendants of the specific intent to prevent the discovery and arrest of Sidney Steinberg, and unless such intent so exists that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

In the crime charged in the second count of the indictment herein alleging a conspiracy on the part of the defendants to violate Section 3 of Title 18 of the United States Code, by receiving, relieving, comforting and assisting Robert G. Thompson, a necessary element is the existence in the minds of the defendants of the specific intent to hinder and prevent the apprehension and punishment of Robert G. Thompson, and unless such intent so exists that crime is not committed.

Adopted from CALJIC 72-C.

Defendants' Proposed Instruction No.....

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to

recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates, but rather judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court reminds you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

CALJIC 4.

People vs. Selby, 198 Cal. 426, 439, 245 P. 426, 432.

Defendants' Proposed Instruction No.....

The prosecution and the defendants all are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of each of the defendants. When you have reached a conclusion in that respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon

that original opinion and render his verdict according to his final decision.

CALJIC 3.

Defendants' Proposed Instruction No.....

I instruct you that the offense of harboring and concealing a fugitive from justice is a lesser offense than, and included within, the offense of being an accessory after the fact. If, therefore, you find from all the evidence that the defendants or any of them engaged in conduct amounting to the harboring and concealing of Robert Thompson, for the purpose of preventing his apprehension or arrest, and at the same time if you also find that such defendants or any of them did not engage in activity making them accessories after the fact of the offense for which Thompson was tried and convicted in New York, then you should find such defendants, if any, guilty of harboring and concealing Thompson, and you should return a verdict of not guilty as to any such defendants in regard to the charge of being an accessory after the fact.

I further charge you that conspiracy to commit the substantive offense of harboring and concealing is likewise included within, and constitutes a lesser offense than, the charge of conspiracy to commit the substantive crime of accessory after the fact. Therefore, if you find from the evidence that the defendants or any of them engaged in conduct amounting to conspiracy to harbor and conceal Thompson, but not amounting to conspiracy to be and become accessories after the fact, you are at liberty to find

such defendants, if any, guilty of conspiracy to harbor and conceal Thompson, but you should return a verdict of not guilty as to any such defendants in regard to the charge of conspiracy to be and become accessories after the fact.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Shirley Kremen, also known as Lee Kaplan, the defendant at the bar,

Guilty as to Count One.

Guilty as to Count Two.

Guilty as to Count Three.

Guilty as to Count Four.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Carl Ross, also known as Carl Edwin Rasi, and Robert Edward Newman, the defendant at the bar,

Guilty as to Count One.

Guilty as to Court Two.

Guilty as to Count Three.

Guilty as to Count Four.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Samuel Irving Coleman, also known as William B. Gordon, the defendant at the bar,

Guilty as to Count One.

Guilty as to Count Two.

Guilty as to Count Three.

Guilty as to Count Four.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find Sidney Steinberg, also known as Sid Stein, and Joshua Newberg, the defendant at the bar,

Guilty as to Count One.

Guilty as to Count Two.

/s/ EUGENE E. MARSHALL,
Foreman

[Endorsed]: Filed April 26, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA,

vs.

SHIRLEY KREMEN, also known as LEE
KAPLAN

JUDGMENT AND COMMITMENT

On this 3rd day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon her plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1. Viol. 18 USC 3—Accessory after the fact.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, 18 USC.

Count 3: Viol. 18 USC 1071—Harboring.

Count 4: Viol. 18 USC 371—Conspiracy to viol. Sec. 1071, 18 USC.

(Defts. named in indt. did receive and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment; defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. §§ 2, 3, 5 of Act of June 28, 1940—Smith Act. Said defts. did harbor Sid Stein, alias Sidney Steinberg; defts. had notice and knowledge that warrant for his arrest had been issued in U. S. Dist. Ct., S.D.N.Y. Said defts. unlawfully did conspire with

each other, with Robert G. Thompson, a co-conspirator, and with divers other persons unknown. In pursuance of the conspiracy and to effect object thereof in the Nor. Dist. of Calif. and elsewhere one or more of defts. herein did further said conspiracy by committing certain overt acts, etc. Offenses committed on or about Aug. 27, 1953, in vicinity of Twain Harte, Tuolumne Co., Calif.), as charged said Cts. 1, 2, 3, 4 of indictment; and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of—

Count One—One (1) Year.

Count Two—One (1) Year.

Ordered that said terms of imprisonment imposed on Counts One and Two commence and run Concurrently.

Count Three—Six (6) Months.

Count Four—Six (6) Months.

Ordered that said terms of imprisonment imposed on Counts Three and Four commence and run Concurrently with one another, and commence and run Concurrently with term of imprisonment imposed on Count One.

Total Imprisonment—One (1) Year.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA

vs.

CARL ROSS, alias CARL EDWIN RASI, alias
ROBERT EDWARD NEWMAN

JUDGMENT AND COMMITMENT

On this third day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1: Viol. 18 USC 3—Accessory after the fact.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, 18 USC.

Count 3: Viol. 18 USC 1071—Harboring.

Count 4: Viol. 18 USC 371—Conspiracy to viol. Sec. 1071, 18 USC.

(Defts. named in indictment did receive and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment; defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. §§ 2, 3, 5 of Act of June 28, 1940—Smith Act. Said defts. did harbor Sid Stein, alias Sidney Steinberg; defts. had notice and knowledge that warrant for his arrest had been issued in U. S. Dist. Ct., S.D.N.Y. Said defts. unlawfully did conspire with each other, with Robert G. Thompson, a co-conspirator, and with divers other persons unknown. In pursuance of the conspiracy and to effect object thereof in the Nor. Dist. of Calif. and elsewhere, one or more of defts. herein did further said conspiracy by committing certain overt acts, etc. Offenses committed on or about August 27, 1953 in vicinity of Twain Harte, Tuolumne Co., Calif.), as charged said Cts. 1, 2, 3, 4 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of—

Count One—One (1) Year.

Count Two—One (1) Year.

Ordered that said terms of imprisonment imposed on Counts One and Two commence and run Concurrently.

Count Three—Six (6) Months.

Ordered that said term of imprisonment imposed on Count Three commence and run from and after the Expiration of term of imprisonment imposed on Counts One and Two.

Count Four—Six (6) Months.

Ordered that said term of imprisonment imposed on Count Four commence and run from and after the Expiration of term of imprisonment imposed on Count Three.

Total Imprisonment—Two (2) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

In the United States District Court for the North-
ern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA

vs.

SAMUEL IRVING COLEMAN, also known as
WILLIAM B. GORDON

JUDGMENT AND COMMITMENT

On this 3rd day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1: Viol. 18 USC 3—Accessory after the fact.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, 18 USC.

Count 3: Viol. 18 USC 1071—Harboring.

Count 4: Viol. 18 USC 371—Conspiracy to viol. Sec. 1071, 18 USC.

(Defts. named in indt. did receive and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment; defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. §§ 2, 3, 5 of Act of June 28, 1940—Smith Act. Said defts. did harbor Sid Stein, alias Sidney Steinberg; defts. had notice and knowledge that warrant for his arrest had been issued in U. S. Dist. Ct., S.D.N.Y. Said defts. unlawfully did conspire with

each other, with Robert G. Thompson, a co-conspirator, and with divers other persons unknown. In pursuance of the conspiracy and to effect object thereof in the Nor. Dist. of Calif. and elsewhere, one or more of defts. herein did further said conspiracy by committing certain overt acts, etc. Offenses committed on or about August 27, 1953, in vicinity of Twain Harte, Tuolumne County, Calif.), as charged said Cts. 1, 2, 3, 4 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of—

Count One—One (1) Year.

Count Two—One (1) Year.

Ordered that said term of imprisonment imposed on Count Two commence and run from and after Expiration of term of imprisonment imposed on Count One.

Count Three—Six (6) Months.

Ordered that said term of imprisonment imposed on Count Three commence and run from and after Expiration of term of imprisonment imposed on Count Two.

Count Four—Six (6) Months.

Ordered that said term of imprisonment imposed

on Count Four commence and run from and after Expiration of term of imprisonment imposed on Count Three.

Total Imprisonment—Three (3) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA

vs.

SIDNEY STEINBERG, alias SID STEIN and
JOSHUA NEWBERG

JUDGMENT AND COMMITMENT

On this 3rd day of May, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been con-

victed upon his plea of Not Guilty and a Verdict of Guilty of the offense of following violations:

Count 1: Viol. 18 USC 3—Accessory after the fact. On or about Aug. 27, 1953 in Nor. Dist. of Calif., in vicinity of Twain Harte, Calif., defts. Sidney Steinberg, et al., did receive, relieve, comfort and assist Robert G. Thompson in order to hinder and prevent his apprehension and punishment. Defts. knew he had been convicted in U. S. Dist. Ct., S.D.N.Y. for viol. Secs. 2, 3, 5 of Act of June 28, 1940, Smith Act.

Count 2: Viol. 18 USC 371—Conspiracy to viol. Sec. 3, Title 18 USC. At a time and place unknown, in Nor. Dist. of Calif. and elsewhere, defts. Sidney Steinberg, et al., unlawfully conspired with each other and with divers other persons unknown. Object of said conspiracy was to receive, etc., said Robert G. Thompson as aforesaid. Defts. well knew he had violated Secs. 2, 3, 5 of Act of June 28, 1940, Smith Act. In pursuance of said conspiracy and to effect object thereof, deft. Sidney Steinberg, while using name of Joshua Newberg, committed certain overt acts on or about Aug. 1, 1953 and certain other dates, in vicinity of Twain Harte, Calif., as charged said Counts 1 and 2 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of—

Count One—Two (2) Years.

Count Two—One (1) Year.

Ordered that said term of imprisonment imposed on Count Two of indictment commence and run from and after the expiration of imprisonment imposed on Count One.

Total Imprisonment—Three (3) Years.

(Indictment contains four counts. Defendant not named in Counts 3 and 4.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment filed this 5th day of May, 1954.

[Title of District Court and Cause.]

EXCERPTS FROM DOCKET ENTRIES

1953

Nov. 10—Deft. pleaded not guilty, ord. contd. to Nov. 27 hrg. mos. to be set. as to deft. Sidney Steinberg. Defts. Coleman, Blau, Ross, Kremen, pleaded not guilty, Ord. contd. to Nov. 27 for Hrg. on Mos. and to be set.

Nov. 27—Motions to Dism. and for B/Ps, Denied; motions for discovery and inspection and for subpoena, Denied, without prejudice; Fur. Ord. case contd. to Dec. 11th to be set. (Applicable to all 5 defts. in this

1954 case.)

Feb. 8—Mr. Schnacke made a motion to strike the defts. motion for return of seized property; evid. was introd. on behalf of the deft. After hrg. Mr. Gladstein the motion was ordered submitted and contd. to Feb. 9, 1954 at 10:00 a.m. for ruling on Motions to dismiss and motion for production of list of seized articles. (Heard by Judge Murphy.)

Feb. 9—Deft's motion for return of seized property is denied, and the government's motion is Granted; Fur. Ord. that the Defts may upon demand have a summarized list of seized property. 48 Filed Order denying deft. Sidney Steinberg, Kremen, Ross and Coleman's motion for return of seized property.

1954

Apr. 5—Hrg. on Mo. to return seized property. Ord. cont'd to Apr. 6 for further hrg. (Goodman.)

Apr. 6—By Stip. of counsel Ord. Mos. off Cal.

Apr. 12—Ordered case assigned to Judge Goodman, for trial. Trial Begun, jury impaneled (with Alternate Jurors). Motion for a mis-trial and for judgment of acquittal Denied. Motion on ground of surprise, for fair adjournment to prepare further defense, Denied. Motion by Mr. Gladstein and Mr. Leonard to withdraw as counsel for Steinberg, Granted. Defendant, Steinberg to appear on his own behalf. Motion by Mr. Gladstein that defendant, Julia Blau, be furnished reporter's daily transcript at Government's expense, taken under submission. Evid. introduced and case contd. to April 13, 1954 at 10:30 a.m. for further trial.

Apr. 13—Further Hrg. on motions to suppress evid. and to return seized property. After argument, ea. of said mos. was ord. Denied. Trial resumed, Mo. of deft., Blau, for copy of reporter's daily transcript at Government expense, heretofore submitted, ordered Denied. Cont'd to Apr. 14, 1954 for fur. trial.

Apr. 14—Trial resumed, Evid. introd. ord. contd. to Apr. 15 for fur. trial.

1954

Apr. 15—Trial resumed, evid. introd. Motion by Norman Leonard for a mis-trial was Denied, Ord. contd. to Apr. 16th for fur. trial.

Apr. 16—Trial resumed, evid. introd., ord. contd. to Apr. 19th for trial.

Apr. 19—Trial resumed, evid. introd. Motion made by Norman Leonard, Esq., for a mis-trial, was denied, Motion made by Mr. Gladstein, Esq., for striking the testimony of Henry Capozzi was Granted. Ord. this case contd. to Apr. 20th for further trial.

Apr. 20—Trial resumed, Motions by defense counsel to strike the testimony of Philip J. Moody, Andrew M. Price, and part of the testimony of Harry L. Sotzen were denied; Motions to strike the testimony of Robert Darden and Robert Munger were granted: a motion by Norman Leonard for a mis-trial was denied, case contd. to April 21st for fur. trial.

Apr. 21—Trial resumed, Mo. to strike testimony of witness Mike Lackey was denied. Plaintiff rests subject to hrg. on pltf's Mo. that all the testimony and exhibits heretofore admitted as to certain defts be admitted to all defts. Contd. to Apr. 22nd for hrg. of Mos. in absence of the Jury, jury excused until Apr. 23rd at 10 a.m.

1954

Apr. 22—Trial resumed. Motion by plaintiff to re-open case for purpose of introducing certain exhibits. granted. Motion by defts. to strike the testimony of certain witnesses granted in part and denied in part. Mo. by defts. for mis-trial denied. Motion by defts. to strike certain exhibits granted in part and denied in part. Motion for judgment of acquittal denied as to all defendants except deft. Blau. Motion for judgment of acquittal granted as to deft. Blau and her bond exonerated. The motion, heretofore made, that the testimony of certain witnesses be admitted as to all defts. was granted as to all defts., except deft. Blau. The defts. offered no evidence and rested.

Apr. 23—Trial resumed. evid. introd. Ord. contd. to Apr. 26th for fur. trial.

Apr. 26—Trial resumed. Jury retired for deliberation at 12:07 p.m., returned at 9:47 p.m. with the following verdict: Defts. Shirley Kremen, Carl Ross, and Samuel Irving Coleman were found Guilty with respect to counts one, two, three and four. The deft. Sidney Steinberg was found Guilty with respect to counts one and two. Ordered all the defendants remanded to the custody of the Marshal and this case contd. to May 3rd for hearing a motion for a new trial and for judgment.

1954

May 3—Richard Gladstein, Esq., made a motion for judgment of Acquittal, for a new trial and in Arrest of Judgment on behalf of all the defendants, each of said motions were denied. A request that ea. deft. be permitted to address the court before sentence was granted.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Shirley Kremen, 546 North Sierra Bonita, Los Angeles, California.

Name and address of appellant's attorney: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA § 3. Count II—Conspiracy to violate 18 USCA § 3. Count III—Violation of 18 USCA § 1071. Count IV—Conspiracy to violate 18 USCA § 1071.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 1 year on Count I; for 1 year on Count II; for 6 months on Count III; for 6 months on Count IV. All sentences to run concurrently.

Name of Institution where now confined, if not on bail: San Francisco County Jail.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 3, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Carl Ross, 1126 Plymouth Avenue North, Minneapolis, Minnesota.

Name and address of appellant's attorneys: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA §3.
Count II—Conspiracy to violate 18 USCA §3.
Count III—Violation of 18 USCA §1071. Count IV
—Conspiracy to violate 18 USCA §1071.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 1 year on Count I; for 1 year on Count II; for 6 months on Count III; for 6 months on Count IV. Sentences on Counts I and II to run concurrently; sentences on Counts III and IV to run consecutively with each other and consecutively with the sentences imposed on Count I.

Name of Institution where now confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

May 3, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Samuel Irving Coleman, 249 E. Broadway, New York, New York.

Name and address of appellant's attorneys: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA §3. Count II—Conspiracy to violate 18 USCA §3. Count III—Violation of 18 USCA §1071. Count IV—Conspiracy to violate 18 USCA §1071.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 1 year on Count I; for 1 year on Count II; for 6 months on Count III; for 6 months on Count IV. All sentences to run consecutively.

Name of Institution where now confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 3, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Sidney Steinberg, 1161 Shakespeare Avenue, Bronx, New York.

Name and address of appellant's attorneys: Gladstein, Andersen & Leonard, 240 Montgomery Street, San Francisco 4, California.

Offense: Count I—Violation of 18 USCA §3.
Count II—Conspiracy to violate 18 USCA §3.

Concise statement of judgment or order, giving date, and any sentence: May 3, 1954—Imprisonment for 2 years on Count I; for 1 year on Count II. Sentences to run consecutively.

Name of Institution where now confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 3, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Come now the defendants above-named and pursuant to the rules in such cases made and provided hereby state the points upon which they intend to rely in connection with the appeal in the above-entitled cause.

I.

The indictment and each count thereof do not state facts sufficient to constitute an offense against the United States.

II.

The evidence against the defendants and each of them was obtained as a result of an unlawful search and seizure and the trial court erred in denying defendants' motions to suppress it.

III.

The evidence is insufficient to support the ver-

dicts or any of them against the defendants or any of them on any of the counts of the indictment.

IV.

The trial court erred in denying defendants' motions for judgment of acquittal.

V.

The trial court erred in refusing to charge the jury as requested by the defendants.

VI.

The trial court erred in charging the jury as it did.

VII.

The trial court erred in denying defendants' motions for a mistrial.

Dated: May 6, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed May 6, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby notified that the defendants above-named hereby designate the following as their record on appeal in the above-entitled cause:

1. The indictment.
2. The motions to dismiss, for a bill of particulars, for the issuance of a pretrial subpoena, and for discovery and inspection, filed on or about October 22, 1953.
3. The orders of the trial court denying the motions to dismiss, for a bill of particulars, for the issuance of a pretrial subpoena, and for discovery and inspection, entered on or about November 27, 1953.
4. The pleas.
5. The motion for the return of seized property filed on or about February 4, 1954.
6. The order and memorandum opinion denying the motion for the return of seized property and granting the government's motion to dismiss said motion, entered on or about February 8, 1954.
7. The motions for return of seized property and its suppression as evidence as to defendants Kremen and Blau, filed on or about March 26, 1954.
8. The affidavits submitted in support of the foregoing motions, filed on or about March 26, 1954.
9. The order denying the motions for return of seized property and its suppression as evidence as

to defendants Kremen and Blau, entered on or about April 13, 1954.

10. All of the instructions submitted by the defendants.

11. All of the instructions given by the trial court.

12. The stenographic record of the motion for judgment of acquittal made in open court on April 22, 1954, at the conclusion of the government's case; unless it will also appear in the reporter's transcript designated as Item 25 below.

13. The stenographic record or the minute order containing the ruling upon the aforesaid motion; unless it will also appear in the reporter's transcript designated as Item 25 below.

14. The stenographic record of the motion for a judgment of acquittal made in open court on April 22, 1954, at the conclusion of all of the evidence; unless it will also appear in the reporter's transcript designated as Item 25 below.

15. The stenographic record or the minute order containing the ruling upon the aforesaid motion; unless it will also appear in the reporter's transcript designated as Item 25 below.

16. The verdicts.

17. The stenographic record of the motions for judgment of acquittal, new trial, and arrest of judgment made in open court on May 3, 1954; unless it will also appear in the reporter's transcript designated as Item 25 below.

18. The stenographic record or the minute order containing the rulings upon the aforesaid motions;

unless it will also appear in the reporter's transcript designated as Item 25 below.

19. The judgment and sentence against each of the defendants.

20. The notices of appeal.

21. The entire reporter's transcript of the proceedings dealing with motions to suppress, which proceedings occurred on or about February 8, 1954, April 5, 1954, and April 13, 1954.

22. All of the exhibits received in evidence.

23. The stenographic record of the motions for mistrial made on April 12, 15, 19, and 20, 1954; unless it will also appear in the reporter's transcript designated as Item 25 below.

24. The stenographic record or minute order containing the ruling upon the aforesaid motions; unless it will also appear in the reporter's transcript designated as Item 25 below.

25. The entire reporter's transcript of the trial proceedings commencing on April 12, 1954, and terminating on May 3, 1954.

26. The statement of points to be relied upon on appeal dated May 6, 1954.

27. This designation of record on appeal.

Dated: May 6, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

/s/ By NORMAN LEONARD,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed May 6, 1954.

[Title of District Court and Cause.]

**ORDER EXTENDING TIME WITHIN WHICH
TO DOCKET RECORD ON APPEAL**

Upon reading the affidavit of Norman Leonard,
and good cause appearing therefor,

It Is Hereby Ordered that the time within which
defendants may docket the record on appeal in the
above-entitled matter may be, and it is hereby, ex-
tended to and including the 14th day of July, 1954.

Dated June 11, 1954.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

**AFFIDAVIT OF NORMAN LEONARD IN
SUPPORT OF APPLICATION FOR ORDER
FOR EXTENSION OF TIME WITHIN
WHICH TO DOCKET RECORD ON APPEAL**

State of California,
City and County of San Francisco—ss.

Norman Leonard, being first duly sworn, deposes
and says: That he is one of the attorneys for de-
fendants above-named. That the time within which
the record on appeal in the above-entitled matter
may be docketed expires on June 14, 1954. That
your affiant has been informed by the official court

reporter that certain portions of the transcript of testimony taken in the above-entitled matter have not yet been transcribed because of the fact that the press of business has prevented the reporter from completing the task. The reporter informs your affiant that he expects the entire record will have been transcribed within a period of thirty days from June 14, 1954.

Wherefore, your affiant prays for an order extending the time within which to docket the record on appeal in the above-entitled matter to and including the 14th day of July, 1954.

/s/ NORMAN LEONARD

Subscribed and sworn to before me this 9th day of June, 1954.

[Seal] PEARL STOCKWELL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies thereof, in the above-entitled case, and that they

constitute the record on appeal herein as designated by the attorneys for the appellants:

Indictment.

Motion to dismiss.

Motion for discovery and inspection.

Motion for bill of particulars.

Motion for the issuance of a pretrial subpoena.

Notice of motion for the return of seized property.

Notice of motion for the return of seized property and its suppression as evidence.

Notice of motion for the return of seized property and its suppression as evidence.

Affidavit for the return of seized property.

Order.

Defendants' proposed instructions.

Verdict as to Shirley Kremen.

Verdict as to Carl Ross.

Verdict as to Samuel Irving Coleman.

Verdict as to Sidney Steinberg.

Judgment and commitment as to Shirley Kremen.

Judgment and commitment as to Carl Ross.

Judgment and commitment as to Samuel Irving Coleman.

Judgment and commitment as to Sidney Steinberg.

Excerpts from docket entries.

Notice of appeal of Shirley Kremen.

Notice of appeal of Carl Ross.

Notice of appeal of Samuel Irving Coleman.

Notice of appeal of Sidney Steinberg.

Statement of points to be relied upon on appeal.

Designation of record on appeal.

Order extending time within which to docket record on appeal.

Affidavit of Norman Leonard in support of application for order for extension of time within which to docket record on appeal.

Thirteen volumes of Reporter's transcript.

Plaintiff's Exhibits 1 to 25, inclusive.

Plaintiff's Exhibits 29 to 30, inclusive.

Plaintiff's Exhibit 78 to 81, inclusive.

Plaintiff's Exhibits 83 to 86, inclusive.

Plaintiff's Exhibit 88.

Plaintiff's Exhibits 90 to 111, inclusive.

Plaintiff's Exhibits 113 to 115, inclusive.

Plaintiff's Exhibits 120 to 122, inclusive.

Defendants' Exhibits A to A-14, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of July, 1954.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ By WM. C. ROBB,

Deputy.

[Title of District Court and Cause.]

MOTION TO SUPPRESS EVIDENCE — MOTION TO RETURN SEIZED PROPERTY

Monday, April 5, 1954

Appearances: For Plaintiff: United States Attorney, by Robert H. Schnacke. For Defendants: Gladstein, Andersen & Leonard, by Richard Gladstein.

The Clerk: The United States versus Shirley Kremen, et al; motion to suppress evidence, motion to return seized property.

(Opening statements made on behalf of the respective parties.)

WILLIAM H. WHELAN

a witness called on behalf of the defendants being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Q. Will you please state your name to the Court. A. William H. Whelan.

Direct Examination

Mr. Gladstein: Q. Mr. Whelan, you are with the Federal Bureau of Investigation, are you not?

A. Yes, sir.

Q. And directing your attention to the month of August of last year, you were so engaged and employed at that time as well, were you not?

(Testimony of William H. Whelan.)

A. Yes, sir.

Q. Now, on a date in August, the 27th of August, 1953, did you participate in the making of certain arrests of some of the defendants in this case at a house—property at Twain Harte, California?

A. Yes, sir.

Q. Who was the agent in charge?

A. I was, sir.

Q. And do you recall what time of the day approximately this arrest was made?

A. It was about five minutes after one in the afternoon.

Q. In the afternoon. And who besides yourself participated in the making of the arrests?

A. Several agents. In other words, under my supervision at that time.

Q. How many?

A. Totaling in numbers, as I recall, about fifteen, and one matron.

Q. And one matron?

A. And one matron.

Q. Fifteen agents and one matron. By “matron” you mean a woman employee?

A. That’s right.

Q. I see. I take it then, is it correct, that you were expecting to make a search, were you, of a woman that you intended to arrest?

Mr. Schnacke: Object to that as calling for the conclusion of the witness and as a leading question.

Mr. Gladstein: Well, it certainly is leading but

(Testimony of William H. Whelan.)

I should have the right to ask leading questions. As far as the other objection, I——

Mr. Schnacke: I see no propriety in the asking of leading questions of a government employee, regardless of who the defendants might be.

Mr. Gladstein: May I state——

The Court: I am wondering whether or not the purpose of having an agent of the opposite sex would have any materiality.

Mr. Gladstein: It certainly would go—if your Honor will permit me to some of the factual foundations for my legal point that the conduct engaged in by the agents in the search and seizure was improper.

The Court: Well, that might be true, but I don't see what materiality there would be as to who the agents were, what the intentions were with respect—what the reasons were for having a woman officer present.

Mr. Gladstein: Well, if I might say so——

The Court: I will sustain the objection to the question in that form. What the facts are you, of course, can bring out.

Mr. Gladstein: Very well.

Your Honor, may I ask this, in view of Mr. Schnacke's objection, I should like to state that I think I should be accorded the right to ask leading questions of the witness and that the asking of leading questions should not be objectionable inasmuch as this witness is presumably, as an employee and agent of the United States the adverse party

(Testimony of William H. Whelan.)

in this case, one who occupies a position of such character as that, that I should be permitted to proceed as though the witness were under cross examination.

Mr. Schnacke: If your Honor please——

The Court: Don't argue over that. That is an abstract question in advance. You ask the questions and I will rule on them.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. When and on what day approximately, Mr. Whelan, did you make the decision to make this arrest?

A. Well, the actual decision to make the arrest was made on the day of the arrest.

Q. What's that?

A. Made on the day of the arrest.

Q. When on that day?

A. Oh, approximately an hour—fifteen minutes—between thirty minutes and an hour before the actual arrest was made.

Q. Did you make that decision or communicate that decision to those who were with you——

A. Yes, sir.

Q. ——or whom you were in charge of?

A. Yes, sir.

Q. On what day did you consider—begin considering the question of arresting any of the occupants of that house?

Mr. Schnacke: If your Honor please, I will object to that as immaterial. The considerations, ideas,

(Testimony of William H. Whelan.)

prior to an arrest of the arresting agents have no materiality in such a motion as this.

The Court: I think the objection is good. Sustained.

Mr. Gladstein: Q. At the time that you made the decision to make the arrests who did you decide that you were going to take into custody under arrest?

Mr. Schnacke: Same objection, your Honor.

The Court: Yes. I can't see the materiality of the mental processes of arresting officers prior to an arrest. What were the facts at the time of the arrest, they are only material here in this proceeding. They might have had good, bad or indifferent motives. A lot of things may have entered into a decision as to making an arrest. I don't see that that has any materiality on a motion of this kind.

Mr. Gladstein: You don't wish to engage in argument——

The Court: Whatever you had in mind that is pertinent, you can certainly bring out as to the facts that occurred.

Mr. Gladstein: I want to show facts that would show that the arrest, at least as to certain of the defendants, was not lawful and not valid.

The Court: What they had in mind wouldn't have anything to do with that. The circumstances wouldn't determine the legality of the arrests.

Mr. Gladstein: Q. Mr. Whelan, you were present at the time four of these defendants were taken

(Testimony of William H. Whelan.)

into custody at this house in Twain Harte, isn't that so?

A. The word "before" there,—I don't get the meaning there. I was present at the time of the arrest.

Q. I thought I said "four". I was referring to four of the defendants.

A. Oh, excuse me.

Q. Were you present when the defendant, Patricia Blau later on was arrested?

A. No, sir.

Q. So we will confine your testimony to the arrest at Twain Harte. A. Thank you, sir.

Q. All right. You found that to be—appear to be private premises located in the town of Twain Harte, did you not?

Mr. Schnacke: Object to that as leading.

Mr. Gladstein: I will withdraw it.

Mr. Gladstein: Q. Just before you made the arrests, will you tell the Court from your best recollection a description of the premises outside and inside in which the arrests occurred?

A. Well, the premises were a cabin located, to the best of my knowledge, outside the village of Twain Harte off a secondary road, and I would judge that the cabin was located some fifty to seventy-five yards back from the road. It was an isolated cabin in the sense that there were not any other cabins visible in the area, from the road at least.

There were trees in front of it and set to one

(Testimony of William H. Whelan.)

side and to the back apparently in somewhat of a meadow on the other side, although there were some trees in it, but it was more meadow than the other territory.

The cabin itself appeared to be a two-story structure with a little porch on one side of it.

And after entering, it was noted that there was a living room and dining room, as I recall, and a lavatory and a kitchen on the first floor, and I believe two bedrooms upstairs on the second floor.

Q. As you approached, how did you approach, on foot or in automobiles?

A. In automobiles. I approached.

Q. How many such automobiles were there?

A. There were six automobiles in all.

Q. Containing agents of the Federal Bureau of Investigation? A. Yes, sir.

Q. Did you drive off the roadway onto the premises, constituting the yard area?

A. There was what I would call a driveway leading from the secondary road up to this cabin and apparently beyond this. This road also branched off and apparently went to another cabin. That I am not certain because I did not explore it, but this little roadway leads to the front of the house and to the side, in other words.

Q. So you and the other automobiles drove up the roadway toward the front of the house?

A. To the front of the house, right.

Q. When you got out did you find one or more of the defendants seated out in the yard?

(Testimony of William H. Whelan.)

A. Yes. They were not—. I found two defendants out in the yard. They were not seated. They were standing.

Q. Who were they?

A. I don't know that they were two of the defendants in this action. They were two defendants in actions, however, Robert Thompson and Sidney Steinberg.

Q. And what, if anything, was done with regard to Robert Thompson and Sidney Steinberg?

A. Well, I announced that we were agents of the Federal Bureau of Investigation and that we were there to arrest them. I called on them to surrender, as well as anyone else in the vicinity.

Q. Was there anybody else?

A. They responded by putting their hands in the air and I directed agents to go in the house—

Q. Before you go to that, tell us what was done with Thompson and Steinberg at that time, after they raised their hands.

A. I directed two positions for them to go to.

Q. What?

A. In other words, they were within ten feet—to take them out of the doorway, get them over in a safe area. I directed that they go over to two trees that were there in the yard.

Q. Yes.

A. And directed that the agents take charge of them, search them and be responsible for them.

Q. Did you tell the agents what to do or did you see what the agents did with them at that

(Testimony of William H. Whelan.)

point? A. Yes. They searched them.

Q. And what else?

A. I don't believe we searched them at that particular moment. It wasn't until after we went in and took into custody these three persons who were on the inside of the cabin.

Q. Let's stay for a moment, Mr. Whelan, with Thompson and Steinberg.

What was done with regard to them at the time they took these positions near the trees that you directed them behind?

A. Well, they were searched, sir.

Q. Isn't it true that their hands were put—

A. They—. Go ahead.

Q. —their hands were put around trees and they were handcuffed, isn't that right?

A. No, sir, their hands were not put around trees at any time.

Q. Not at any time? A. Oh, no.

Q. Were they handcuffed?

A. Yes, sir, they were handcuffed.

Q. At that time?

A. After they were searched, they were handcuffed and permitted to sit on the ground there beside the tree.

Q. All right. Was any weapon found on them, on any of them, at the time of the search?

A. No.

Q. At that time did you or did any agent at your direction advise either of those men, that is,

(Testimony of William H. Whelan.)

Steinberg or Thompson, what they were under arrest for?

A. I believe it was—. I advised them all, in other words, when all five persons were taken outside——

Q. Officer, I asked you if, at that time, when you had Thompson and Steinberg in custody and had them handcuffed, did you, yourself, or did any agent under your direction advise either of them as to the reasons for their arrest? A. Yes.

Mr. Schnacke: If the Court please, the witness has answered.

The Witness: A. I advised them that they were being arrested because of the warrants that were outstanding for the arrest of both of them in the Southern District of New York.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. Now, did you have those warrants, or copies of them, with you?

Mr. Schnacke: Object to that as immaterial. There is no necessity for the arresting officers to carry warrants with them. It is immaterial whether he has them with him or not.

The Court: What is the point of that?

Mr. Gladstein: I want to know what the authorization was that the officer had, how he received it, and the one possibility is that he had a copy of——

Mr. Schnacke: Are you denying there were warrants outstanding for the arrest of these men?

Mr. Gladstein: I am not conceding——

(Testimony of William H. Whelan.)

Mr. Schnacke: There is no issue with respect to that.

Mr. Gladstein: I am not conceding anything about the validity.

The Court: I don't think these motions would have anything to do with it.

Mr. Gladstein: But it might relate to the other arrests.

The Court: I don't see the materiality of that. I will sustain the objection.

Mr. Gladstein: Q. Did you have an arrest—warrant for the arrest of any of the defendants, other than Steinberg and Thompson?

Mr. Schnacke: Same objection.

The Court: Have you any point with respect to the others that have to do with the warrants?

Mr. Gladstein: Yes. I wish to elicit if it is the fact, and I think it is that no warrant of arrest was ever secured or issued by any authority for the arrest of the defendants other than Steinberg and Thompson.

The Court: Isn't that a matter of record?

Mr. Schnacke: It is, your Honor.

The Court: Let's not waste time about things that are not—that are in the record.

Mr. Gladstein: Can it be stipulated to?

Mr. Schnacke: I don't think there is any necessity to stipulate to the record. The record speaks for itself without stipulation.

Mr. Gladstein: The record does not speak unless it says so on the subject and, if I understand the

(Testimony of William H. Whelan.)

California question correct, I should like to state then for the record that as I understand what just happened is that it is agreed to be the truth that no warrant for the arrest of the defendants, Shirley Kremen, Carl Rasi, Carl Ross and Samuel Coleman, was ever obtained.

The Court: Are you talking prior to the arrest?

Mr. Gladstein: Prior to the arrest.

The Court: I don't see that it has any particular materiality on the motion to suppress.

Mr. Schnacke: It is correct, your Honor.

The Court: It is correct?

Mr. Schnacke: There were warrants outstanding for Thompson and Steinberg, and the arrest was made for the offense being committed in the presence of the officers by the other defendants found in the cabin.

Mr. Gladstein: Q. After Thompson and Steinberg were handcuffed did you then go into the premises themselves?

A. I don't know whether it was after they were handcuffed or not. My recollection is that it was before actually—but—yes, I did. I directed first that other agents go in and I followed them in, and all three parties on the inside were directed to come outside also, and they were directed to take particular positions—in other words in a semi-circle—where they were—the men were searched and then they were handcuffed and seated. The young lady was searched with the help of the matron.

Q. She what?

(Testimony of William H. Whelan.)

A. She was searched with the help of the matron and then she was seated on a chair, as I recall, outside by the porch.

Q. And what, if anything, did you or any of your agents say to any or all of these three people in the house?

A. They were advised that they were being arrested by virtue of the fact that they were harboring the two people who we had warrants outstanding for.

Q. Do you remember what you said in that regard, if you said anything? Did you say that to any of the defendants?

A. Yes, sir. If it wasn't in those words, it was that substance.

Q. When was that, while still in the house or after you had taken them outside?

A. While they were all outside. In other words, in every instance I tried to advise them—in other words, when they were all in each other's presence.

Q. Is this correct then, Mr. Whelan, that you found the other three defendants in the house, that would be Ross, Shirley Kremen and Coleman?

A. Yes, sir.

Q. And you gave orders to cause them to be taken outside? A. Yes, sir.

Q. And outside there they were told they were under arrest for the reasons that you indicated?

A. Yes, sir.

Q. Were they all handcuffed?

(Testimony of William H. Whelan.)

A. They were all then handcuffed, correct.

Q. They were all subject to a personal search?

A. That's right, sir.

Q. And I take it no weapons of any kind were found on any of them?

A. That's right, sir.

Q. Then what did you do with the defendants?

A. They were fingerprinted and they were photographed. Then they were told that they would be taken in without any more delay than was necessary, to be arraigned and that in view of the fact that we had to take them to San Francisco that if they cared to make any choice of clothing they would then be taken in and could make whatever choice of clothing they desired to make to wear into the city for the arraignment, or any other material that they needed to take with them.

So one by one they were each taken in the house to make whatever change of clothes they cared to make and to pick up anything else they wanted to pick up.

They were also advised that if there was any property in the vicinity inside or outside, of a valuable nature or personal nature, since the place was located in the woods as it was, that if they would make it known we would locate it and try to safeguard it in some way.

And when the whole proceeding was completed which was within approximately an hour, they were then advised that they were going to be taken to San Francisco.

(Testimony of William H. Whelan.)

Each one was placed in a separate automobile and we came to San Francisco, arriving here shortly after six o'clock, and they were arraigned—. They were then asked to order dinner. Two stops were made on the way in. After we arrived here they ordered dinner and then the arraignment was held, as I recall sometime after eight o'clock.

Q. Now, Mr. Whelan, was it then—. On what day, that same day of the arrest, the 27th, was it, or was it some later day, that the premises at this house at Twain Harte was subjected to a search and the contents taken, the contents that constitutes this compilation that was made here some time ago?

Mr. Schnacke: As to the extent of your knowledge, Mr. Whelan.

A. Oh, I told the parties, as a matter of fact, at that time that I was leaving a group of men in order that we could expedite coming into the city and holding the arraignment, and I would leave some men to complete this search, to obtain whatever was there that should be obtained or secured, they should secure the house and should secure the automobiles also because of the location of the premises as it was in the woods, I felt that there was a necessity to secure the premises as best we could.

Q. You mean by that, in order to avoid some pilferage or loss in some manner of the items that belonged to one or the other of the defendants?

A. Yes, sir.

Q. You must have received a report at some

(Testimony of William H. Whelan.)

time in these proceedings as to the actual conduct of the search and the items that were seized. Can you not tell me from that when that was actually done?

Mr. Schnacke: Object to that as hearsay.

The Witness: A. Well the search was completed anyway.

Mr. Schnacke: Just a moment. I object to that as hearsay, your Honor.

Mr. Gladstein: Calling for information in an official report in the ordinary line and course of business.

The Court: Well, I will overrule it. The only question is when was the search made and the articles removed.

Mr. Gladstein: Yes, your Honor, that is the question.

The Court: Overruled.

Mr. Gladstein: Q. Was it that day or the next day?

A. No, it was completed that afternoon.

Q. All right. And where were the articles taken?

A. They were taken here in San Francisco to our office.

Q. When did they arrive?

A. Well, I have forgotten the exact time but it was later on that evening.

Q. Was anything at all left in the premises after this search or was everything taken out that was movable?

A. Well, anything of a—I don't really know

(Testimony of William H. Whelan.)

what was—I wasn't there, in other words, when they left. The principal things that were to be taken were those things that belonged to the—in any way to the defendants. The furniture and those sort of things—in other words, apparently it was a well-furnished cabin. There was no furniture of any sort taken.

Q. Is it correct that the directions you gave were substantially that with the exclusion of the items of furniture, such as beds, tables, chairs, that items of movable personal property were to be removed?

A. Any personal property, that's right.

Q. Your answer to my question is yes?

A. My answer to your question is personal property.

Q. Mr. Whelan, did you secure or attempt to secure a search warrant for the premises?

A. No, sir. This was conducted incidental to the arrest.

Mr. Gladstein: I move the last part of the answer be stricken. I only asked him if a search warrant had been sought.

The Court: Of course, that is the issue in the case.

Mr. Gladstein: Yes, I know, but it is for the Court rather than Mr.—I know your Honor won't be influenced by his statement of it, but I would rather——

The Court: All right, the last part of the answer, last half of the answer, may go out.

(Testimony of William H. Whelan.)

Mr. Gladstein: Q. And it is correct that no search warrant was ever obtained, isn't that correct? A. That's correct.

Q. Was there any reason why a search warrant could not have been sought from a magistrate?

Mr. Schnacke: Object to that as immaterial. The search was a valid search made incident to an arrest. There is no necessity under those——

The Court: That calls for a certain conclusion. I will sustain the objection.

Mr. Gladstein: Q. Were you searching the house for something in particular?

Mr. Schnacke: Object to that as calling for a conclusion of the witness and assuming a fact not in evidence. This witness did not make the search.

The Court: Was he searching the house for something in particular; that would call for a state of mind of those who made the search. I will sustain the objection. It is what they did that counts. That is the only thing that is involved, as it is in every such case. It is what was done.

Mr. Gladstein: Q. What were you looking for, if anything in particular, at the time that you directed the search to be made.

Mr. Schnacke: Object to that as being asked and answered, and on the further ground this witness did not make the search. He already testified he directed his agents to take from the premises the personal property that did not appear to be the furnishings of the cabin. That answers the question

(Testimony of William H. Whelan.)

as fully as this witness has indicated any ability to answer it.

The Court: Well——

Mr. Schnacke: This witness wasn't looking for anything.

The Court: Well, he was the agent in charge, but what is the last question—was he searching for anything in particular?

Mr. Gladstein: Yes. What was it that he was searching for?

Mr. Schnacke: What were you looking for?

The Court: I will sustain the objection.

Mr. Gladstein: Q. Did you tell the agents to look for anything in particular?

A. No, there was no specific matter that they were to look for in particular, but it was the general rules; in other words, that you search for whatever is incident to—any weapons, for instance.

Mr. Gladstein: Q. Did you find any weapons?

A. Any contraband or anything that would be a fruit of the crime or a part of the crime.

Q. Those were their directions, standing directions? A. Yes, sir.

Q. All right, and following this search was it disclosed whether any weapons were found on the premises?

A. No, sir, no weapons were found.

Q. Neither on the persons of the defendants or any of the persons arrested or on the premises?

A. That's right, sir.

Q. Was any contraband found?

(Testimony of William H. Whelan.)

Mr. Schnacke: Object to that as calling for the opinion and conclusion of the witness.

The Court: Yes. Sustained. You can ask him what he found?

Mr. Gladstein: Well, it consists of twenty-five pages.

The Court: Offer it in evidence. Then if it is of any importance——

Mr. Gladstein: If your Honor has it there, I will do that. I only have this copy.

The Court: Have it identified and ask him if that was the list that was taken and offer it in evidence.

Mr. Gladstein: Q. Look through that if you will, Mr. Whelan, and state if that is what it purports to be.

(Handing witness.)

The Witness: A. This list was prepared under my supervision of the material that was taken at the cabin.

Mr. Schnacke: I am sorry, your Honor, there are only two copies of this list that I know of. I have one carbon copy here.

Mr. Gladstein: I will undertake to have a copy stricken off and your Honor can have the original.

The Court: Do you want to mark that in evidence?

Mr. Gladstein: Then I will be without it.

The Court: You can withdraw it and make a copy of it.

(Testimony of William H. Whelan.)

Mr. Gladstein: Very well, your Honor, I will do that.

The Court: Any objection to this going in evidence?

Mr. Schnacke: No objection.

The Court: Do you want it marked?

Mr. Gladstein: Yes, your Honor.

The Court: Mark it in evidence.

The Clerk: Defendant's Exhibit A introduced and filed into evidence.

(Whereupon document consisting of 25 pages entitled, "Personal Property and Papers", received in evidence and marked Defendant's Exhibit A.)

Mr. Gladstein: Has your Honor had a chance to look through this?

The Court: No. Unless you want to make reference to it—You may want to make use of it.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. Before undertaking these arrests did you have any information of any kind leading you to believe that the defendant, Shirley Kremen was committing any offense.

Mr. Schnacke: Object to that as not being material. The state of mind of the arresting officer is not material to this inquiry.

Mr. Gladstein: I want to say that the information that the arresting officer has in advance and when he acquires it is, I submit, most germane to the question of the validity of the search or seizure and may even go to the validity of the arrests, too,

(Testimony of William H. Whelan.)

because it is generally the rule that if the officer wants to arrest somebody and he knows about it in advance he should seek and obtain from a magistrate the warrant of arrest. He should have reasonable grounds upon which he can arrest properly, and that a magistrate shall grant the search warrant, and that is what the function of a magistrate is, to stand between the officer who wants to do the arresting and the person whose privacy is going to be disturbed. I don't know of any other way of getting these——

The Court: Of course that goes to the question of the arrest. But I don't quite know what you are getting at on the motion to suppress evidence.

Mr. Gladstein: May I say in answer then, it is this, if your Honor please, as I read the cases, and setting apart for the moment the question of the defendant, Steinberg and the defendant, Thompson——

Mr. Schnacke: How can we set that apart? That was the essential arrest made at the premises. I think it is a little difficult to set that apart from any other part of that single transaction.

Mr. Gladstein: Well, that is a matter of argument, that Mr. Schnacke is advancing, but the fact of the matter is that even if an officer has reason to believe that a person for whom there is an outstanding warrant of arrest—let us assume—is to be found in a particular location, a dwelling house, that is not a probable cause or sufficient reason to go in and arrest everybody else in that dwelling.

(Testimony of William H. Whelan.)

The Court: That all depends on the circumstances.

Mr. Gladstein: That is just what I am inquiring about. What were the circumstances?

The Court: I don't—it doesn't seem to me it is material what the state of mind of the officer was as to the persons for whom he did not have a warrant of arrest, as long as he was acting under warrants of arrest of persons whom he believed to be in a certain place.

Mr. Gladstein: He arrested them.

The Court: I don't believe his state of mind with reference to anybody else has anything to do with it.

Mr. Gladstein: I don't think it is a state of mind. I didn't ask him about his state of mind, your Honor. I asked him what information he had before he went there.

The Court: I will sustain the objection.

Mr. Gladstein: Q. Did you or did someone in superior authority to you make the decision to arrest the persons, all of them who were actually arrested that day?

A. Well I made the decision in consultation.

Q. And when was that decision made in consultation, when was the consultation had?

A. Well, in other words, if there was others—if a known fugitive is there, if there are others there that it can be said could be part of the harboring process——

Q. Was that the subject of consultation?

(Testimony of William H. Whelan.)

A. —then the others should be taken too.

Q. I say, was that the subject of consultation?

A. Yes, sir.

Q. That was the subject of the decision?

A. Yes, sir.

Q. In other words, that anybody and everybody that you found at or near the premises would be taken into custody on the theory they might be harboring, is that right?

Mr. Schnacke: That is a misstatement of the answer.

The Court: Yes. I will sustain the objection.

Mr. Gladstein: Q. Well, is it true that your consultation and your decision was to take into custody anybody and everybody who might be found on the premises with either of these men that you were looking for, is that right?

Mr. Schnacke: I object to that as a leading question.

The Court: Well, it is leading. It hasn't got much to do with that. I wouldn't pay much attention to that anyhow? How could anyone answer that question?

Mr. Gladstein: Well, he has already said that they consulted about that very matter.

The Court: There might be any number of people there. He said the consultation was—it was determined at the consultation they would take into custody anyone found on the premises that would have anything to do with possible harboring of the defendants for whom they had warrants.

(Testimony of William H. Whelan.)

Mr. Gladstein: Well, your Honor, I didn't so understand the testimony.

The Court: Well, that is what I understood him to say.

The Witness: That is what I tried to say.

Mr. Gladstein: Q. Did you find anything in the search that it was illegal for the defendants to possess?

Mr. Schnacke: I object to that as calling for the conclusion of the witness.

The Court: I don't see the materiality of this, counsel.

Mr. Gladstein: The materiality,——

The Court: He already said that there were no weapons found. Now this runs a pretty wide gamut, anything that was illegal for any person to possess. It might be any number of things.

Mr. Gladstein: Well, but that is——

The Court: Your list will show what was found. Now this calls for the opinion and conclusion of the witness. You can point out on the list if there is anything there that in law prohibits keeping. It takes too much time to go over this.

Mr. Gladstein: Certainly.

The Court: You can point that out if you want to, if there is anything there.

Mr. Gladstein: I beg your pardon?

The Court: I say, if there is anything in that list that is privileged by any statute, you can point that out.

Mr. Gladstein: I will do it the other way. I

(Testimony of William H. Whelan.)

will ask the witness to take the list and to look at it and refresh his recollection and tell us which items, if any, to be found there is forbidden by any statute to possess.

Mr. Schnacke: I object to that as calling for the conclusion of the witness.

The Court: I can determine that. I don't have to have the F.B.I. tell me what is against the law. You can point out the statute. The witness can't give an opinion on legal statutes, on the statutes, as to what is or is not prohibited by law. He can tell what he found there.

Mr. Gladstein: He has done that.

The Court: If there is anything there, that any statute prohibits you can tell me, I will take your word for it. You tell me what statute prohibits it.

Mr. Gladstein: I don't know of any statute.

The Court: All right. If there is no objection to that, let's pass on to something else. You needn't answer that. (addressing the witness.)

The Witness: Thank you, your Honor.

Mr. Gladstein: Q. What, if anything, did you find—withdraw that.

When you got there and you placed the defendants—I am talking about Shirley Kremen and Ross and Coleman—what, if anything did you see or hear them do or say that caused you to decide that they were in the course of the commission of some offense?

Mr. Schnacke: I object to that as a complex

(Testimony of William H. Whelan.)

question. The question may be what did he observe them do.

Mr. Gladstein: All right. I will break it down if that is the objection, that is, complex, to save time.

Mr. Gladstein: Q. What did you see any of them do that caused you to believe that they or any of them were committing an offense?

Mr. Schnacke: The latter part of it is what makes the question complex, actions as affecting his state of mind. He can't testify as to the actions that he observed, not as to what effect they had on his mind.

The Court: It is not the officer's opinion that determines whether or not there is a valid arrest or search and seizure. It is what was done.

Mr. Gladstein: It is what the officer says the defendants did or said as well.

The Court: You can ask him anything you want to as to what the defendants did or said. But as to the impact of that upon the witness, it wouldn't have any weight with me at all as a judge.

Mr. Gladstein: I'm sorry——

The Court: Because I wouldn't care what he thought about it. If the facts were sufficient, they are sufficient. If they are not sufficient, they are not sufficient.

Mr. Gladstein: But in order to ascertain, if your Honor please, whether the arresting officer had proper cause, I understand the decisions clearly to say that we are entitled to ascertain from him

(Testimony of William H. Whelan.)

under examination what he observed or learned by the use of his senses that caused him—led him to feel that an offense had been committed because that is the probable cause.

The Court: The probable cause lies in the facts and circumstances and not what any officer thought about it. Even if he told me on the witness stand now that the facts and circumstances were not—assuming that he would make such a ridiculous statement under the circumstances—but presuming that he said the facts and circumstances in his opinion were not sufficient to warrant him taking these people into custody, if the facts and circumstances were such that they were justified, the Court could still hold that the circumstances were sufficient because the agent might not be telling the truth now, the witness might not be telling the truth as to his state of mind. But it isn't his state of mind that determines the matter. I don't care what he says about his state of mind in the matter. It is what the circumstances were at the time. And you may go into that as much as you wish to.

Mr. Gladstein: All right.

Mr. Gladstein: Q. Were all of your agents armed, or most of them? A. Yes, sir.

Q. And the weapons were drawn and directed at the defendants? A. Yes, sir.

Q. All right. And it was after you had displayed the weapons that the search was made, that is true, isn't it? A. Yes, sir.

Q. And none of the defendants were asked for

(Testimony of William H. Whelan.)

any permission to allow the search to be made, were they?

A. They were asked, sir, but the defendants had very little, if anything, to say.

Q. They said nothing to you?

A. Very little.

Q. Well, what did they say, if anything?

A. Well, I can't say that they said nothing, but it was very little that they said, in other words.

Q. Practically nothing?

A. That's right.

Q. So, in other words, it is correct in summary to say that none of the defendants in this case said anything that had to do with the subject of harboring any of the people who were there, is that right? A. (No response.)

Q. Well, they said nothing, isn't that right?

A. They said nothing.

Q. All right. What did you see any of the defendants do at any time just before or during the arrest?

A. Well, they were, in the first place, all living together.

Q. What did you see them do?

A. Living together at this cabin.

Mr. Gladstein: I am going to move this be stricken.

The Court: That's right. All he wants you to tell him now is what did you see the defendants do at the time when you arrived there. I think

(Testimony of William H. Whelan.)

you have covered part of it already, but I don't know whether you covered all of it.

The Witness: A. Well, two of the defendants were outside.

Mr. Gladstein: Q. That is, Thompson and Steinberg? A. And Steinberg.

Q. All right.

A. And three of them were inside the house. They were dressed at that time in what I would call play clothes, sun clothes. There were some laundry on the line. The whole house looked like it was lived in. There were two cars there, as I recall.

The Court: Two automobiles?

A. Two automobiles. There was food in the house.

The Court: Of course you are going a little far afield from the question, which was only what did you see the defendants or any of them do.

Mr. Gladstein: That is the question.

The Court: Q. You have already said that you saw two of them in the yard and they were standing there and had play clothes on.

Now did you see these two defendants before you had gone to the others do anything further?

The Witness: A. Nothing except come out of the house.

The Court: Q. Well you saw the two defendants who were apprehended in the yard, you saw them come out of the house first?

The Witness: A. Yes, sir.

(Testimony of William H. Whelan.)

Mr. Gladstein: Q. And how long after they came out of the house was it that you drove up and arrested them?

A. Why, I suppose it would be within thirty minutes, thirty to forty-five minutes.

The Court: Q. They were out in the yard then?

Mr. Gladstein: Q. They were out in the yard then for about half an hour?

The Witness: A. Yes, sir.

Q. That is, Steinberg and Thompson?

A. Yes, sir.

Q. You had them under your surveillance?

A. They were recognized, yes, sir.

Q. All right. And then you arrested them and during the period that you had them under surveillance what, if anything, did you observe them do?

A. They were in the yard there talking together.

Q. Anything else?

A. Roaming around together, came out of the house together.

Q. You saw nothing else?

A. Nothing else that I recall.

Q. Then after you placed them under arrest—
I come now to direct your attention to the other people, Shirley Kremen, Coleman and Ross—what, if anything, did you see any of them do?

A. See them do?

Q. Yes.

A. I didn't see them do, in the strict sense, anything other than that they were right there and

(Testimony of William H. Whelan.)

gave every indication of being part of the living situation there.

Q. By reason of what did they give that indication?

A. As I say, it was—they were all living together at the house there.

Q. How did you know that?

A. Well, they were found together there.

Q. Anything else that led you to that conclusion.

A. Their clothes were there apparently.

Q. When did you find that out.

A. Found it out for sure right then.

Q. What was it that told you that, any of the defendants? A. No, sir.

Q. Well I come back——

A. There was just the factual situation that existed, in other words. They were there. There was a rent receipt there made out, and so forth.

Q. Made out to whom?

A. As I recall it, it was made out to Shirley.

Q. And you learned that she had rented the premises? A. That was verified later, yes.

Q. All right. You had reason to believe at the time you entered the premises that she was a lawful tenant of the premises?

✓ A. I did not know it. We did not know that fact, in other words at that time.

Q. Did you seek to ascertain at that time?

A. I don't recall whether we sought to ascertain at that time or not, since, as I say, there

(Testimony of William H. Whelan.)

The Court: Business might be bad with you and you might run off with it. I'm being facetious, but all I am intending to say is he wants to return it to whoever establishes their right to it and whoever executes the necessary receipts and so forth, he will return it.

Mr. Gladstein: The only right that seems to me that has to be established is the right to the possession of the premises and therefore everything that is in those premises——

The Court: That is a legal question.

Is there anything else?

Mr. Gladstein: Nothing, except I would remind him if he would——

The Court: Find out who the agent was in charge.

Mr. Gladstein: Yes, sir, so I can develop the facts of that arrest.

The Court: Any questions you wish to ask, Mr. Schnacke?

Mr. Schnacke: Might we take a short recess?

(Short recess taken.)

Cross Examination

Mr. Schnacke: Q. Mr. Whelan, under your instructions had agents of the Federal Bureau of Investigation gone to the vicinity of this cabin at some time prior to this arrest? A. Yes.

Q. And on the day of the arrest, at what hour did agents of the Bureau go to the scene of the arrest?

(Testimony of William H. Whelan.)

A. Well, the first group were in the vicinity of the cabin around 6:00 a.m.

Q. And what time did you appear at the scene?

A. Just at the time of the arrest. In other words, it was about 1:00 p.m., five minutes after one.

Q. Were you in contact with the agents who were observing the cabin from 6:00 a.m. on?

A. Yes, sir, I was in contact with them by radio.

Q. And did they report to you the matters that they observed at the cabin from 6:00 a.m. up until the time of the arrest or until the time you appeared? A. Yes, sir, they did.

Q. What was the nature of that report?

A. The nature of that report was to identify persons as they came out or went in and to name them if they could. The last report I had, Steinberg and Thompson as being present.

Q. And as coming out of the cabin?

A. As coming out of the cabin.

Q. Did you receive any report of any person going into the cabin after 6:00 a.m.

A. No, sir.

Q. Do you recall when the sun rose, when it was on this occasion, that is, August 27, 1953?

A. Well, it was right around—we were then on daylight saving time and it was right around shortly after six o'clock.

Q. So your agents observed that any persons who were in the cabin at the time of the arrest

(Testimony of William H. Whelan.)

had been there at daylight on the morning of the arrest, is that correct?

A. They could not—as I understood it, the agents could not observe anyone on the inside. They saw no one, in other words, go in during that period.

Q. Do you know when the warrant for the arrest of Robert Thompson was issued by the Court for the Southern District of New York?

Mr. Gladstein: I am going to object to that as calling for a conclusion.

Mr. Schnacke: I asked the witness if he knew.

Mr. Gladstein: I don't concede that there has been such a warrant, if your Honor please.

The Court: You mean there has never been a warrant, is that what you mean?

Mr. Gladstein: I have never been able to find out, if your Honor please, whether there was a warrant for the arrest of Robert Thompson, but if there was certainly Mr. Schnacke should be able to supply a copy of it.

The Court: What is the materiality of that?

Mr. Schnacke: I am simply trying to establish the period during which the warrants for the arrest of Thompson and Steinberg had been outstanding.

The Court: What would that have to do with this present motion? I don't see the materiality of that.

Mr. Schnacke: I will withdraw the question.

The Court: I mean, there is some case that has

(Testimony of William H. Whelan.)

been in the books on it, isn't there, that sets forth the case?

Mr. Gladstein: What, your Honor?

The Court: I say, isn't there some case in the other State?

Mr. Gladstein: There is a case in which Robert Thompson was tried for contempt. Is that the case which your Honor has reference to?

The Court: Doesn't that recite the circumstances?

Mr. Schnacke: Yes.

Mr. Gladstein: It doesn't cite anything about a warrant, so far as I know.

The Court: I don't see that there is any materiality to it.

Mr. Schnacke: No further questions.

Mr. Gladstein: Just a couple of questions.

Redirect Examination

Mr. Gladstein: Q. Mr. Whelan, did you learn what the address was of this house in which the arrests were made, did it have an address?

A. Not that I know of, sir.

Q. Did you learn who owned the property?

A. After the arrest we learned, yes.

Q. Who was it?

A. As I recall, the name was Germany.

Q. A Mr. and Mrs. Germany? A. Yes.

Q. You say that your agents were reporting to you from six a.m. that day? A. Yes, sir.

Q. What they observed and what they saw?

(Testimony of William H. Whelan.)

A. Yes, sir.

Q. What did they tell you they saw the defendant, Shirley Kremen do, if anything?

A. I don't recall that they reported anything during that period.

Q. The same question as to the defendant, Coleman, what is your answer?

A. I don't recall that they reported anything.

Q. The same question as to the defendant, Ross.

A. I don't recall they reported anything.

Q. Do you know how your agents were deployed at or about the premises, or did they report to you about that?

A. Yes, approximately.

Q. And tell us how many such men there were in the general location that you told them to take.

A. There was a hill to one side of the cabin and they were deployed along that hill.

Q. All of them?

A. There were five.

Q. And all were so deployed?

A. Yes, sir.

Q. Do you know whether they were in a position to see and observe every possible means by which a person might come into or leave the premises?

A. That was their intent, sir.

Q. You don't know that that was so, do you?

A. No, sir.

Mr. Gladstein: That is all.

(Witness excused.)

THELMA L. GERMANY

a witness called on behalf of the defendants being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Q. Will you please state your name to the Court. A. Thelma L. Germany.

Direct Examination

Mr. Gladstein: Q. Mrs. Germany, where do you reside, please? A. 631 Third. Modesto.

Q. You and your husband are the owners, are you not, of a piece of property in or near the village of Twain Harte? A. Yes we are.

Q. Were you the owners of that property in the summer of last year? A. Yes, sir.

Q. Have you and your husband lived in the property? A. Yes, sir.

Q. And during what period have you lived in it?

A. Well, we moved from there last—yes, it was last March.

Q. A year ago, in other words? A. Yes.

Q. Had you been living in the premises prior to that? A. Yes.

Q. For how long?

A. About a year and a half.

Q. All year around, in other words?

A. Yes.

Q. Is that a two-story house?

A. Yes, it is.

Q. And it is a dwelling house?

A. Yes, sir.

(Testimony of Thelma L. Germany.)

Q. Are there houses nearby?

A. Yes, there is a house about a hundred foot just below us and there are other houses around, but you can't see them very good for the trees. Only this side of the hill.

Q. It is a wooded area all about there?

A. Yes.

Q. As a resort and vacation area? A. Yes.

Q. And Twain Harte is not an incorporated but it is an unincorporated village or town, isn't it?

A. Yes.

Q. And it has a County road as its main road?

A. Yes, it does.

Q. And then the other roads that lead to all the other houses, including your own, they are called secondary roads, are they? A. Yes.

Q. The road to your house is the same road as the road to other houses?

A. Well, not necessarily. The road to our house leads to about, oh, three or four other houses.

Q. I see. All right. And the premises are equipped with light and gas and all the facilities for living, is that so? A. Yes.

Q. Last year some time, you and your husband decided to offer that place for rent, did you?

A. Yes.

Q. And did you place it with some agent?

A. Yes.

Q. And who was the agent?

A. Jimmy Morrow.

(Testimony of Thelma L. Germany.)

Q. And later on were you advised by him that he had a tenant for the premises? A. Yes.

Q. And you do know that it was thereafter rented? A. Yes.

Q. What was the rent?

A. \$125.00 a month.

Q. And was it paid? A. Yes.

Q. Do you know whether the rental was paid to and covering the date of August 27th of that year?

A. Gee, I don't know, you would have to ask Mr. Morrow about that. I have forgotten.

Q. He would know about that? A. Yes.

Mr. Gladstein: All right. That is all.

Mr. Schnacke: Thank you.

(Witness excused.)

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The Clerk: Q. Please state your name to the Court.

A. James Morrow.

Direct Examination

Mr. Gladstein: Q. Mr. Morrow, what is your business?

A. I am a real estate broker.

Q. Are you located in some particular area in this state?

(Testimony of William H. Whelan.)

The Court: Business might be bad with you and you might run off with it. I'm being facetious, but all I am intending to say is he wants to return it to whoever establishes their right to it and whoever executes the necessary receipts and so forth, he will return it.

Mr. Gladstein: The only right that seems to me that has to be established is the right to the possession of the premises and therefore everything that is in those premises——

The Court: That is a legal question.

Is there anything else?

Mr. Gladstein: Nothing, except I would remind him if he would——

The Court: Find out who the agent was in charge.

Mr. Gladstein: Yes, sir, so I can develop the facts of that arrest.

The Court: Any questions you wish to ask, Mr. Schnacke?

Mr. Schnacke: Might we take a short recess?

(Short recess taken.)

Cross Examination

Mr. Schnacke: Q. Mr. Whelan, under your instructions had agents of the Federal Bureau of Investigation gone to the vicinity of this cabin at some time prior to this arrest? A. Yes.

Q. And on the day of the arrest, at what hour did agents of the Bureau go to the scene of the arrest?

(Testimony of William H. Whelan.)

A. Well, the first group were in the vicinity of the cabin around 6:00 a.m.

Q. And what time did you appear at the scene?

A. Just at the time of the arrest. In other words, it was about 1:00 p.m., five minutes after one.

Q. Were you in contact with the agents who were observing the cabin from 6:00 a.m. on?

A. Yes, sir, I was in contact with them by radio.

Q. And did they report to you the matters that they observed at the cabin from 6:00 a.m. up until the time of the arrest or until the time you appeared?

A. Yes, sir, they did.

Q. What was the nature of that report?

A. The nature of that report was to identify persons as they came out or went in and to name them if they could. The last report I had, Steinberg and Thompson as being present.

Q. And as coming out of the cabin?

A. As coming out of the cabin.

Q. Did you receive any report of any person going into the cabin after 6:00 a.m.

A. No, sir.

Q. Do you recall when the sun rose, when it was on this occasion, that is, August 27, 1953?

A. Well, it was right around—we were then on daylight saving time and it was right around shortly after six o'clock.

Q. So your agents observed that any persons who were in the cabin at the time of the arrest

(Testimony of William H. Whelan.)

had been there at daylight on the morning of the arrest, is that correct?

A. They could not—as I understood it, the agents could not observe anyone on the inside. They saw no one, in other words, go in during that period.

Q. Do you know when the warrant for the arrest of Robert Thompson was issued by the Court for the Southern District of New York?

Mr. Gladstein: I am going to object to that as calling for a conclusion.

Mr. Schnacke: I asked the witness if he knew.

Mr. Gladstein: I don't concede that there has been such a warrant, if your Honor please.

The Court: You mean there has never been a warrant, is that what you mean?

Mr. Gladstein: I have never been able to find out, if your Honor please, whether there was a warrant for the arrest of Robert Thompson, but if there was certainly Mr. Schnacke should be able to supply a copy of it.

The Court: What is the materiality of that?

Mr. Schnacke: I am simply trying to establish the period during which the warrants for the arrest of Thompson and Steinberg had been outstanding.

The Court: What would that have to do with this present motion? I don't see the materiality of that.

Mr. Schnacke: I will withdraw the question.

The Court: I mean, there is some case that has

(Testimony of William H. Whelan.)

been in the books on it, isn't there, that sets forth the case?

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Q. Have you and your husband lived in the property? A. Yes, sir.

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A. James Morrow.

Direct Examination

Mr. Gladstein: Q. Mr. Morrow, what is your business?

A. I am a real estate broker.

Q. Are you located in some particular area in this state?

(Testimony of James Morrow.)

A. Twain Harte, California, Tuolumne County.

Q. How long, approximately, have you been operating that business there?

A. About seven years.

Q. Some time in the late spring or early summer of last year did you have occasion to take over for rental purposes a house belonging to Mr. and Mrs. Germany? A. I did.

Q. And did you subsequently have occasion to rent those premises?

A. Actually the house was given to me for sale and the rental of the property was not—did not enter into the original agreement and I was approached by Mrs. Lee Kaplan, desiring to rent a cabin, that was secluded and quiet because her brother was ill with nerves and she wanted to be where they would be by themselves, and I showed Mrs. Kaplan, I believe, one or two cabins in the park property——

The Court: You are getting far afield. The question was, did you have occasion to rent it. Did you rent it?

A. I asked Mr. and Mrs. Germany by phone if they would consider renting their cabin.

The Court: You don't have to go into all of that. The only question is did you rent it?

A. Yes I did, your Honor.

The Court: Go ahead.

Mr. Gladstein: Q. When did you do that, Mr. Morrow?

(Testimony of James Morrow.)

A. Well, the rental date started approximately June 26, 1953.

Q. And the rental was paid for how long?

A. Mrs. Kremen paid—or Mrs. Kaplan paid the rental monthly in advance.

Q. And was the rent paid for—in other words, it was paid from a date in June to cover a date in July?

A. Yes, sir.

Q. And then when the monthly rent was due in July she paid another month's rent?

A. Yes, sir.

Q. And there was some conversation about how long she was going to have the place was there?

A. Well, Mrs. Kaplan mentioned a minimum of three months, possibly four months.

Q. The rent was fully paid by her on August 27, the date she was arrested there, isn't that so?

A. Yes, the rent was paid if I remember correctly, up to and including the 25th of September.

Mr. Gladstein: (Speaking to spectator): Will you stand up, please? (A person in the Courtroom standing.)

Mr. Gladstein: I have asked the defendant, Shirley Kremen to stand.

Mr. Gladstein: Q. Do you recognize her as the lady to whom you rented the premises?

A. I do.

Q. She is the person?

A. That is the lady.

Mr. Gladstein: That is all.

(Testimony of James Morrow.)

Mr. Schnacke: Thank you.

(Witness excused.)

(Discussion between Court and counsel relating to further evidence to be presented.)

(Whereupon the matter was continued until 9:30 o'clock a.m. on April 6, 1954; further continued to 9:30 o'clock a.m. on April 13, 1954.)

[Endorsed]: Filed July 1, 1954.

[Title of District Court and Cause.]

EXCERPT OF VOIR DIRE EXAMINATION
OF THE JURY

Monday, April 12, 1954

The Court: Members of the jury panel: the case on trial today is a criminal proceeding: United States of America against Shirley Kremen, also known as Lee Kaplan; Patricia Julia Blau, also known as Janet Conroy; Carl Edwin Rasi, also known as Carl Ross and Robert Edward Newman; Samuel Irving Coleman, also known as William B. Gordon; Sidney Steinberg, also known as Sid Stein and Joshua Newberg.

The Grand Jury for this District on September 16, 1953, filed in this court an indictment. And indictment is a charge or complaint setting forth the violation of federal statutes which the Grand Jury claims have been committed by the defendants.

This indictment or charge is in four counts, four separate charges made against the defendants in the indictment, which are in substance as follows:

(Reading indictment.)

That is the general nature, members of the jury panel, of the criminal charge that has been filed herein.

Each of these defendants has appeared and pleaded not guilty to the charges contained in the four counts of this indictment. That has put at issue all of the material allegations of this indictment. It is to resolve the question of the guilt or innocence of the defendants, and each of them, on the issues thus raised that the jury is to be selected here this morning.

Let me say to you in the first instance, members of the jury panel—and it should be borne in mind at all stages of the case—as in every criminal proceeding, by the filing of an indictment there is no presumption that the defendants or any of them are guilty of the charge made against them. To the contrary, it is traditional in our system of justice that the persons charged with a criminal offense are presumed to be innocent. That presumption exists in this case and it continues until such time as the Government convinces the jury beyond a reasonable doubt of the guilt of the defendants, and thus only may a verdict of guilty be found against the defendants, or any of them.

As in all criminal cases, members of the jury panel, the United States, being the plaintiff or prosecuting party, the Government is represented

by the United States Attorney's Office of the district. In this district the United States Attorney is Mr. Lloyd Burke, and the prosecution of this particular case is in the hands of Assistant United States Attorney Robert H. Schnacke and Richard H. Foster, who sit facing the jury box. All of the defendants except the defendant Steinberg are represented by attorneys Richard Gladstein and Norman Leonard, who sit at that table (indicating).

* * * * *

Mr. Gladstein: Would your Honor be good enough to inquire, if there is some evidence offered by the prosecution that connects any of the defendants with communism or the Communist Party, either now or in the past, would that influence the jury against such defendant and prejudice them against giving the defendant a fair trial?

Or, to put it differently, your Honor, if the fact were or if it were shown one or more of the defendants was a communist or had been, in view of Mr. Dolin's answer would he feel prejudiced against that defendant?

The Court: Well, perhaps I might say this to the jury: I have read to you in the indictment the specific charge that is made against each defendant.

One count charges the defendants with being accessories—that is the statutory form of that charge—in concealing or aiding this man Thompson against his apprehension by the authorities, and the defendants are charged with conspiracy to permit that offense. Likewise, there is a similar charge

with respect to harboring the defendant Steinberg. That charge is made against the other defendants. And also they are charged with conspiracy to do that.

It may be that in connection with the evidence in the case—I don't know. I don't know what the evidence is going to be in the case any more than you do—it may develop, as Mr. Gladstein has suggested, that the defendants may be members of the Communist Party or may be communists or may be members of other parties.

They are not charged in this proceeding with any such offense, if there be such an offense. They are charged only with the specific act that I have described several times to you in detail as charged in the indictment, and only that.

They might be Catholics or Protestants or Jews or Republicans or Democrats or members of all different sorts of organizations, and that may appear in connection with the matter. But they cannot be found guilty of the charge against them unless the jury is convinced beyond a reasonable doubt that they committed the offense that is charged in the indictment.

Now, are there any members of the jury who now feel they could not fairly try the defendants on the specific charge contained in the indictment, and give them a fair, square trial, decide the case upon the basis of the evidence and follow the Court's instructions, and generally give a square deal to the defendants? Is there anyone in the jury box, after the statement I have made to you, that has any doubt

about his or her respective ability to act and perform the honest duty of a juror?

I think I have pretty generally covered what you have in mind, haven't I?

Mr. Gladstein: Yes, your Honor.

The Court: Is there anything else that you have?

Mr. Leonard: Would your Honor examine our proposed questions 13 and 14 and consider whether he will put those to the jury?

The Court: Well, I think that my statement to the jury was general enough to cover this matter, Mr. Leonard. I don't think there is any need to elaborate on it.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

OPENING STATEMENT IN BEHALF OF PLAINTIFF

Monday, April 12, 1954

The Clerk: U. S. vs. Kremen, et al.

The Court: Do you wish to make an opening statement?

Mr. Schnacke: Yes, Your Honor.

Ladies and gentlemen of the jury, Your Honor please:

At this initial stage of the proceeding it is customary for the Government and for the defendants, if they so desire, to make what is termed an opening statement. The opening statement is not an

argument but it is an effort on our part to tell you what we consider the charges against the defendants to be and outline for you very briefly the evidence that we intend to present to you to substantiate the charges that have been made.

The evidence, as of course you are aware has to come to you through various witnesses who will take the witness stand and through various items of evidence that will be presented to you physically. The testimony of the various witnesses and the physical evidence will very probably be meaningless to you until everything is before you unless in advance we told you in general what the issues of the case were, what things we are trying to prove and demonstrate to you. With that as a preliminary explanation of the case, I think you will better be able to place in their proper roles, much as you would the items of a jigsaw puzzle, the various things that are going to be presented to you.

We can't give you the whole case at one time or from one witness or one piece of evidence. The case will be built up from a multiplicity of things, and all those things will have their proper place and are to be considered by you in your ultimate determination.

Some of you were sitting in the rear of the courtroom this morning when the Court read the indictment. In view of the fact that the indictment is the basis of the charge against these defendants, because that specifies specifically the things that the Government is obligated to prove, I don't think we

are over-emphasizing the indictment if I should read the significant parts of it to you again.

The first count of the indictment charges that:

“On or about the 14th day of October, 1949, Robert G. Thompson was convicted in the United States District Court for the Southern District of New York for the offense of wilfully and knowingly conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; the aforesaid being in violation of Sections II, III and V of the Act of June 28, 1940, commonly known as the Smith Act.”

And in the first count it is further charged that:

“On or about the 27th day of August, 1953, in the Northern District of California, in the vicinity of Twain Harte, Tulolumne County, California, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Steinberg and Carl Edwin Rasi, knowing that the offense aforesaid had been committed and that the said Robert G. Thompson had been convicted of committing the same, did receive, relieve, comfort and assist the said Robert G. Thompson in order to hinder and prevent his apprehension and punishment.”

The second count of the indictment charges that:

“At a time and place to the Grand Jury unknown, in the Northern District of California and elsewhere, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman, Sidney Stein-

berg and Carl Edwin Rasi, unlawfully, wilfully and knowingly did conspire with each other and with divers other persons to the Grand Jury unknown.

“That the object of this conspiracy was to commit, in violation of Section III of Title 18 of the United States Code, the offense of receiving, relieving, comforting and assisting Robert G. Thompson, in order to hinder and prevent the apprehension and punishment of the said Robert G. Thompson, while the said defendants well knew that the said Robert G. Thompson had violated Sections II, III and V of the Act of June 28, 1940, commonly known as the Smith Act.”

That pursuant to the conspiracy, certain overt acts were committed. His Honor read those overt acts to you this morning. I think it isn't necessary to read those again. It is sufficient at this time simply to say that an overt act is an act done in pursuance of the conspiracy.

Now, a conspiracy generally is something like a partnership. It is an agreement, but an agreement to do an unlawful thing. In this particular thing the agreement is to harbor Robert Thompson from apprehension and punishment.

The overt acts charged in the indictment are not themselves crimes. The crime is not in the commission of one or all of the overt acts. The crime lies in the illegal agreement and in the doing of some act, however innocent that act by itself might be, but in the doing of some act in furtherance of the illegal agreement.

That, then, is the gist of the second count.

Those two counts, you will notice, refer to the protection of Robert Thompson from apprehension and punishment. The third and fourth counts deal with the protection of Sidney Steinberg from apprehension and punishment, the harboring and concealing of Sidney Steinberg. The third count reads as follows:

“That on or about the 27th day of August, 1953, the defendants Shirley Kremen, Patricia Julia Blau, Samuel Irving Coleman and Carl Edwin Rasi, with notice and knowledge of the fact that a warrant had been issued for the apprehension of Sid Stein, also known and named herein as Sidney Steinberg, did, in the Northern District of California, in the vicinity of Twain Harte, Tuolumne County, California, harbor and conceal, so as to prevent his discovery and arrest, the said Sid Stein, also known and named herein as Sidney Steinberg, for whose arrest a warrant had been issued pursuant to law by the United States District Court for the Southern District of New York.”

The fourth count, again a conspiracy charge, charges:

“That, at a time and place to the Grand Jury unknown, in the Northern District of California and elsewhere, defendants Shirley Kremen, Carl Edwin Rasi, Patricia Julia Blau and Samuel Irving Coleman, unlawfully, wilfully and knowingly did conspire with each other, with Robert G. Thompson, named herein as a co-conspirator but not as a defendant, and with divers other persons to the Grand Jury unknown.

“That the object of this conspiracy was to commit, in violation of Section 1071 of Title 18, United States Code, the offense of harboring and concealing, so as to prevent his discovery and arrest, Sidney Steinberg, while said defendants well knew that a warrant for his arrest, under the name of Sid Stein, had been issued on the 20th day of June, 1951, pursuant to law by the United States District Court for the Southern District of New York.”

And, again, the allegation is that, pursuant to the agreement, certain overt acts were performed.

That, then, is the charge laid against the defendants. Basically it is divided into two parts. The defendants tried to prevent the apprehension, arrest and punishment of Robert Thompson. They agreed to commit that crime. The defendants, with the exception of Sidney Steinberg, tried to prevent the apprehension and arrest of Sidney Steinberg, and they formed an unlawful agreement to commit that crime.

The elements of crime that you must find in order to find a verdict of guilty against all of these defendants will be outlined to you by the Court in detail. But generally we must show, I would think, that Thompson and Steinberg were fugitives from justice. We must show that these defendants knew or had reason to know of their fugitive status. We must show that with that knowledge they did something to accomplish the hiding and concealment, the assistance to the prevention of the punishment of Steinberg and Thompson.

And insofar as the conspiracy count is con-

cerned, we must show you from the evidence that there was a joint activity indicative of an agreement, of a conspiracy, between those persons charged here.

The evidence may well show that the conspiracy spread beyond, far beyond, the defendants that are sitting at this table. But the charge is against these defendants. While there may be other conspirators in the conspiracy itself, the conspiracy itself as charged as an offense is charged against the defendants we see here today.

Now, at this time it might be advisable, and before I start telling you of the evidence that we intend to present to you, it is advisable, I think, to caution you that what I am now telling you is not evidence. My comments are merely my expression at this time of what the evidence will show, and when I come to the final argument with you it will be my opinion as to what the evidence did show. But nothing that I can say to you should have any bearing upon your consideration of the evidence. My statements are not evidence.

Similarly, the statements of counsel for the defendants are not evidence. And, again, if any of the defendants choose to represent themselves, the statements that such a defendant make to you as an argument is not to be considered by you as evidence. Evidence is what you hear from the witnesses sitting on that witness stand and sworn to tell the truth. Evidence is what you get from the physical documents and physical things that will be presented to you after having been duly admitted into

this trial. Nothing else is evidence. The rest of it is simply argument or comment on the evidence and not to be considered by you except in that light.

Now, as to the evidence that will be presented in this case: We will present to you the records of the Federal Court for the Southern District of New York showing the conviction of Robert Thompson; showing his being released on bail after conviction and pending appeal; showing his failure to appear at the court at the time required of him; showing the issuance of a warrant for his arrest pursuant to his failure to appear, and showing that he did not appear in that Court until after he had been apprehended at Twain Harte in August of last year.

As to the defendant Sidney Steinberg, we will show you that a Grand Jury in the Southern District of New York returned an indictment against him, and that pursuant to that indictment a warrant was issued for the arrest of Sidney Steinberg. From June, 1951, when that warrant was issued, and until the time of his apprehension at Twain Harte, the defendant Steinberg did not appear in the courts in New York.

On August 26th of last year, the day before this arrest occurred, an F.B.I. agent visited that cabin at Twain Harte about which you will hear so much before this trial is over. He saw there a very innocent pastime going on: The Defendant Coleman, along with the fugitive Robert Thompson, playing Ping-pong. He saw Shirley Kremen at the premises on that occasion. He saw an automobile there. He had occasion to pass those premises at midnight on

the 26th. He saw no one about the cabin, lights on inside, two automobiles outside the cabin.

From sunrise on the 27th of August that cabin was kept under surveillance. No persons came from the outside area into that cabin during the period the cabin was watched. Persons came in and out of the cabin carrying on their normal daily activities, but no new people appeared. The two automobiles that had been sitting there at midnight the night before were still there.

About 1:05 on that date, just shortly after noon, the arrest was made in the cabin of the defendant Steinberg on the warrant issued against him in New York; of Robert G. Thompson on the process outstanding against him from New York; and against the other persons found in that cabin. The other persons were Shirley Kremen, Carl Ross and the defendant Coleman.

You will learn of the attempts made by the defendants Steinberg and Robert Thompson to change their appearance; of how far different they looked at the time of their apprehension at Twain Harte from the way they had looked when they left New York.

You will find from the evidence that the cabin was well settled, well prepared to harbor and conceal these defendants, these fugitives. The cabin was well secluded. The cabin was specifically designed, specifically selected for the task given to it. You will learn from the evidence that the cabin contained considerable paraphernalia designed specifically for the purpose of harboring these fugitives.

What sort of paraphernalia would that be? Well, in the first place, of course, food and clothing to provide these fugitives with the necessities of life. A substantial number of false identification documents for each of those persons in the cabin. None of the defendants was found there with any identification in his true name. Every person in that cabin had false identification documents. The accounting records, in rough form, to be sure, but accounting records indicating a well organized, well designed plan to get money, spend money, and to spend it for the purpose of protecting these fugitives. And other documents designed as directives to and from the persons in the cabin, telling them why it was necessary to conceal these fugitives, how they were to be concealed.

Documents designed to set up secret meeting places, secret meetings between persons not known to the other one. The whole arrangement, whole paraphernalia, whole design of an underground hiding place for these Communist leaders.

Now, the defendant Blau: Patricia Blau was not arrested in the cabin. A curious thing occurred when the agents came into the cabin. On examining some of the documents that they found there, they found a telephone number. That telephone number was determined to be the telephone number of the residence of Patricia Blau.

They found an automobile—an automobile registered in the name of Janet Conroy. Janet Conroy lived at the address where the telephone number

was listed. Janet Conroy, the evidence will show to you, is the defendant Patricia Blau.

There was also an indication that there was to be a meeting that evening between someone and the defendant Blau. The Federal Bureau of Investigation, you can be sure, didn't overlook that meeting. They were present. They followed the persons who met. They determined that the registered owner of the automobile found in the cabin was one of the people who made that meeting. They followed them for a time with this defendant apparently discovered that she was being followed, started tearing up documents and throwing them out of the car window, at which time the arrest was made.

The evidence will show that this defendant, Blau, had been present at the cabin and had made her contribution to this conspiracy.

Now, I want to say in this connection that these defendants are not charged with being Communists, and we have no intention of asking this jury to convict these defendants because they are Communists. The subject of Communism, however, must come up in this trial. I think it is probably already apparent to you why it must.

These defendants had no personal interest. Their interest in this illegal behavior of which the Government charges them to be guilty derived from their devotion to the Communist Party. The conspiracy was a Communist Party conspiracy to protect its leadership. These people were the pick of the people—these people—the ones designated by the Party to do the job of protecting Thompson

and Steinberg. They followed orders like good Communists.

To that extent, then, to show their motivation, to show why they so acted, to show their knowledge of the background and activities and the matter of the fugitive status of the people they were harboring, to that extent it will be necessary to discuss Communism, to discuss the connection of these persons with the Communist Party.

But I do not urge upon you—. Put it another way: I strongly urge you to bear in mind that Communists or not, these people are entitled to a fair trial; these people are entitled, as the Court will tell you, to a reasonable doubt, and whether you find them to be Communists or not is completely immaterial except insofar as it goes to their motivation. In order to find these defendants guilty you must find more than that they are Communists. You must find that they did the acts and had the unlawful agreement that the Government has charged against them.

Now, in the Communist Party a spade is rarely called a spade. Fugitives are never called fugitives. These fugitives are referred to as "Political Refugees," to put them in a class with other political refugees of history. You never talk about subversive organizations. You never talk about hiding people out. You talk about security measures. You never talk about these people as being fugitives from justice. You talk about them as being an "Unavailable Leadership."

You never talk about the forces of justice. You

never talk about the Federal Bureau of Investigation—you talk about the “Fascist Police.”

And the ultimate aim, of course, of the Communist Party is “Democratization.” And anybody who cooperates with the Government is a “Stool Pigeon.”

These are all well-defined terms from the Communist lexicography. And these terms will appear from time to time throughout the trial. I define them to you now so you will understand the true meaning of those terms when they come to **your** attention.

This conspiracy, this plan or plot of the Communist Party to protect its leadership is not something that was working on a low level. The evidence I think will make it clear to you that the directions for this conspiracy came from the top in the United States and beyond.

That this conspiracy was effective, that it was well planned, that the members of the conspiracy worked hard to do their jobs, is adequately proved by the number of years these defendants were concealed from the processes of law.

The conspiracy, as the evidence will show, imposed upon the members of it, unquestioned obedience. If pursuant to the conspiracy these defendants were told to move, the evidence will show they moved. If they were told to change their names, they changed their names. “Change your job,” you change your job. The individual is meaningless. The function of the Party and of the conspiracy here was, at the sacrifice of any individual, to conceal

these leaders from apprehension and punishment. That is why these secret meetings were set up that the evidence will show you. That is why, as you will agree from the evidence, there was this very, very strict and stringent inquiry into everybody that was to become an agent in this conspiracy.

The local organization that was set up in this area with the responsibility of the hiding of one of these fugitives for a certain period of time and the other for a relatively shorter period of time, was an organization known, for some reason or other, as "Mollie." That was the designation given to what they call an organization of unavailable leadership in this area. Sometimes it is designated as "No. 2" as distinguished from "No. 1," which would be the available or open leadership; that is, those members of the Party who did not have to go underground or did not choose to go underground would be the ostensible leaders, the No. 1, but the No. 2, that was the unavailable leaders. Those were the fugitives from justice, or at least that was the organization that dealt with the fugitives.

The evidence, I think, will make it clear to you that Sidney Steinberg was one of the members of "Mollie," or No. 2, in California. Carl Ross was another member. There were apparently two other members who are not here with us today.

But the function of this "Mollie" was quite clear. An examination of the financial records of it will make it clear that its major expenditures were for the protection of Mr. Steinberg. Major preparations were made to conceal this unavailable leadership.

Another function of "Mollie" as expressed by the Party was that the leadership should not merely be concealed and secured. The leadership must be a working leadership. That is, these underground fugitives were to continue their party work in spite of the fact that they were wanted by the "Fascist Police," and it was in order to permit them to continue that work that this conspiracy grew up.

Now, just who were the fugitives in this case? And, for that matter, who are the defendants?

In order to know what contribution each of them could make, and why he made his contribution, and why it was so important to conceal these fugitives, we will introduce evidence to show what the status was of these persons in the Communist Party.

Robert G. Thompson, who had been convicted of violating the Smith Act, had been the head of the Communist Party in the State of New York and one of the principal functionaries of the Communist Party in the United States.

Sidney Steinberg had been active in the New York area for the Communist Party for many, many years and finally had risen to the rank of Assistant National Secretary of the Communist Party.

Is there any wonder that the Party desired to protect that leadership?

The defendant Coleman had been active for years with the Party in New York. The defendant Ross had been active both in New York and in Minnesota, and had risen to the rank of State Chairman, I believe, in Minnesota.

The four I have mentioned—Thompson, Steinberg, Coleman and Ross—all worked together at one time or another in Communist headquarters in New York. They were all well acquainted with each other, well acquainted with each other's background and character, well acquainted with the status of the others in that organization. When Steinberg and Thompson became fugitives, Coleman and Ross could not help but know who they were and that they were fugitives. When they assisted them, they knew they were assisting fugitives from the law.

The defendant Blau was an active Communist Party organizer in Denver. She has met on many occasions, has attended conferences and meetings with the defendant Sidney Steinberg. She has on occasion indicated her familiarity with the Communist trials that were held on the east coast and from which Thompson and Steinberg were fleeing.

The defendant Kremen, the youngest of the defendants, is in a somewhat different category. She was a school girl radical down at a college in Los Angeles. She was an avid reader of *The People's World*, which gave considerable publicity to the Smith Act trial and to the fugitive status of these defendants. But so far as we know she has never held any important position in the Communist Party.

The evidence will show, none the less, that a highly responsible obligation was placed upon her by the Party. She and her husband, who is not charged here, but whom the evidence will show to be another of the conspirators, were charged with

the responsibility of hiding out the defendant Sidney Steinberg for a considerable period of time. She was the one who did much of the shopping, much of the caring for and housework around the Twain Harte cabin. She was the one that was used as the front at the cabin. I think you will be satisfied from the evidence that she knew what she was doing and that she knew why she was doing it.

Well, what, then, are the contributions of each of these defendants to this offense?

The defendant Coleman, up until the year 1951, was living openly in the City of New York with his wife and family. In 1951 he disappeared into the Communist underground. The evidence will show that Mr. Coleman in April of 1953 appeared in St. Louis, Missouri, not as Coleman—as William Gordon: And as William Gordon he bought an Oldsmobile automobile in April, 1953. In June of 1953 he turned that Oldsmobile automobile in on a brand new Hudson automobile—again, as William Gordon.

Thereafter, at various times William Gordon, in the company of Robert Thompson, the fugitive leadership, will be found around the country at various secluded spots: in the middle of the Ozark country, at the Lake of the Ozarks. Coleman, as Gordon, and Robert Thompson and two unidentified women will be found there on two occasions.

In August of 1953 Thompson will be found up in the northern reaches of Montana. There he uses the name, not Thompson—John Brennan, and as John Brennan he buys a fishing license. That fishing license will ultimately be found in the cabin on the

search that was made there. With John Brennan—Robert Thompson—in Montana is the defendant Coleman, again under the name of Gordon.

On August 20, 1953, seven days before the arrest, the automobile that Gordon had bought in St. Louis is found entering California in the little town of Dorris. There were four people in the automobile, two men and two women. On August 27th and on the day prior Coleman and Thompson are found together at the cabin at Twain Harte, together with some essential amounts of literature identifying each of them as somebody other than the person they are: identification for Thompson as John Brennan; identification for Coleman as William Gordon.

The defendant Carl Ross, known at one time as Carl Rasi, lived openly and under his true name in Minneapolis, Minnesota, until late in 1950. Then he, too, disappeared into the Communist underground, leaving a family behind him at the home in which he had resided.

Carl Ross we find again in July of 1953 over in Oakland when, after identifying himself as someone named Robert Newman, he buys a duplicating machine, a mimeograph type machine, over there and certain supplies, both of which are to be found at the Twain Harte cabin, along with a substantial amount of identification data, none of it bearing the name Carl Ross or Carl Rasi, but a substantial amount of it bearing the name Robert Newman. During the period of July and August Carl Rasi

will have been seen throughout the Twain Harte area on various shopping errands.

Defendant Steinberg is charged with the responsibility of harboring Robert Thompson. He disappeared from his home in New York in June of 1951, and we find him in July of 1953 there in Twain Harte pretending to be Joshua Newberg, teacher of the mandolin, claiming that Shirley Kremer here is his sister. And Shirley Kremen made the same claim, that she is the sister of Steinberg.

At the time of Steinberg's arrest, substantial numbers of false identification papers will be found identifying him as Joshua Newberg. Nothing to identify him as Sidney Stein or Sidney Steinberg. The cabin was obtained for him, as Mrs. Kremen told the real estate agent from whom she leased the cabin. As one of the leaders of "Mollie," or No. 2, it is quite clear the defendant Steinberg was the man in charge at the cabin, and that the cabin was there for the purpose of concealing both himself and, on his arrival, Robert Thompson.

The defendant Shirley Kremen was living with her husband, Kremen, in Los Angeles until the early part of 1952, at which time both of them left Los Angeles and appear in San Jose where they identify themselves not as Irving and Shirley Kremen, but as Lee and Dick Kaplan.

They take living accommodations in San Jose. Apparently there is a mysterious stranger living with them.

In June of 1953 Shirley Kremen announces that

she is leaving San Jose to go to the mountains to take care of a sick aunt. Well, of course, there is no sick aunt, but she does appear in Twain Harte looking for a cabin for her sick brother.

Defendant Kremen obtained the cabin, did the shopping, obtained servicing for the automobile, did, as you will hear, a variety of other things in and around the cabin up there to make the cabin livable and comfortable for Steinberg and Thompson.

The defendant Patricia Blau is also the Janet Conroy who lived and worked in San Jose. She is also the Patricia Blair who lived and worked in Denver, Colorado. She is also the Betty Miller who lived and worked in various places. And, as I pointed out, she is also an important functionary in the Communist Party.

Her contribution to the conspiracy was the acquisition of an automobile. She wouldn't drive the automobile. She made the salesman drive the automobile himself to a place where it could be picked up. She was never seen driving the car, and the car was found at the cabin when the defendant Blau is not there. Fingerprints taken at the cabin will indicate she had been there on occasions.

Well, that in general is the evidence that will show the contribution of each of these defendants to this well-defined, well-organized conspiracy to conceal from the apprehension of the Federal Government Steinberg and Thompson. I think the evidence of the conspiracy, the evidence of the acts done by these defendants in pursuance of the con-

spiracy, the knowledge of these defendants, the motivation of these defendants, will be ample to convince you that all of these defendants are guilty as charged in the indictment.

The Court: Do you want to reserve your statement?

Mr. Gladstein: Yes, I will reserve it, Your Honor. But I should like to address a motion to Your Honor, and for that purpose I ask the jury be excused.

The Court: Well, there are some matters I think we should take up between counsel and the Court anyhow.

Mr. Schnacke: Yes, Your Honor.

The Court: The jury will have a brief recess, and court will remain in session. Please bear in mind the admonition I gave you. The Bailiff will take you out to the juryroom.

(Thereupon the jury left the courtroom and motions were made and argued by respective counsel outside the presence of the jury.)

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

PROCEEDINGS ON MOTION TO SUPPRESS
EVIDENCE

Tuesday, April 13, 1954

Before Hon. Louis E. Goodman, Judge.

(Court convened at the hour of 9:30 a.m.
and the following proceedings were had out-
side the presence of the jury:)

The Clerk: United States versus Kremen, et al;
motion to return seized property and motion to sup-
press evidence, further hearing.

Mr. Schnacke: Your Honor please, the Govern-
ment agreed with the attorney for the defendants
that we would provide the witnesses who were ac-
quainted with the facts surrounding and leading
to the arrest of the defendant, Patricia Blau. There
are two witnesses who have information bearing
upon that point, one of them having information
concerning matters at the Twain Harte cabin, which
were preliminary matters leading to the arrest.
That agent is Roy Erickson.

The other agent who participated in and was
present at the arrest is Agent Shedd. Both of those
agents are present in court for the convenience of
the defendants.

Mr. Gladstein: I will call Mr. Erickson if I
may, your Honor.

ROY ERICKSON

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Roy Erickson.

Direct Examination

Mr. Gladstein: Q. Mr. Erickson, you are already identified in the record as the same Mr. Erickson who took the stand here yesterday and testified? A. Yes, sir.

Q. You have some personal knowledge as to the circumstances leading up to the arrest of the defendant, Mrs. Patricia Blau? A. Yes, I do.

Q. What is that knowledge?

A. While in Twain Harte, immediately following the arrests, I conducted a search of the person of Mr. Ross, of the two automobiles located there, and in those I found certain information which I had relayed on to San Francisco via radio.

Q. What information do you refer to?

A. The information found on Mr. Ross was contained in a small black notebook indicating words which I relayed in. The words——

Mr. Schnacke: I have the notebook here——

The Witness: Excuse me.

Mr. Schnacke: ——if the witness would care to refer to it, and we have no objection to its being offered in evidence at this time.

Mr. Gladstein: I have no objection to him look-

(Testimony of Roy Erickson.)

ing at the notebook if that will facilitate the testimony.

Mr. Schnacke: (Handing notebook to the witness.)

The Witness: A. The words appear on the third page of the notebook reading "George—" I think the abbreviation "Geo.—27".

Next line: "1. Meet Betty—S. J.—6:00 p.m.", and it is apparently the 13th or 3rd, "and Julian".

Also on the next page, page 4, was a list of numbers headed by the letter "J". The numbers are 7-0394. Home 5-9494, with a "3" in parentheses following that, and the word "out" following that.

The next line: "4-4285" with the word "out" following that.

The next line: "3-4538" with the word "off" following that.

Q. Is there a word in front of the figure 5?

A. Yes, there is a word before the 5. That is the number on the second line. It appears to be the word "use".

Q. Very well. Is that the extent of the information you obtained at the house in Twain Harte?

A. No. In examining the two automobiles, one was a 1950 Ford Sedan, brown or bronze in color, and it had on it a temporary registration, or suspensory sheet, I believe you would call it, reflecting that the car was registered to a Janet Conroy at 69 North 10th Street, San Jose, California.

Q. Anything else?

A. No, sir.

(Testimony of Roy Erickson.)

Q. What was the information you relayed, you say?

A. I relayed that information to our San Francisco office.

Q. Let me ask you this, Mr. Erickson: Have you now told us the extent of the knowledge and information you have acquired concerning Patricia Blau, or any connection between her and the subsequent arrest that was made of her?

A. That is the extent of my personal knowledge, yes.

Q. You were present with other agents in the house, were you not? A. Yes, sir.

Q. Were any of them under your direction?

A. No, sir.

Q. Were you under someone else's direction at the time?

A. I was under the direction of the agent in charge, yes.

Q. Who was that?

A. Mr. William Hannan.

Q. Was he present during the occasion or during the time you are referring to in the house?

A. Yes, he was on the property. I advised him that we had found these things, and he simply directed that they be relayed on into San Francisco.

Q. I am trying to find out from you, Mr. Erickson, if there were any other matters of any kind whatever, to your knowledge, that you or other agents there obtained and transmitted on?

A. There was other comment to the effect that

(Testimony of Roy Erickson.)

another agent found an insurance policy in the house for the automobile which was registered to Janet Conroy.

Q. You don't personally know about that, but you know it came out that there was such a policy?

A. Yes, sir.

Q. That is a policy covering public liability or matters of that kind? A. I presume so.

Q. All right. Anything else?

A. No, sir.

Q. The answer, then, to my last question, covers both the knowledge and information of yourself and the other agents who were there with you on that occasion?

A. At the time of the arrest, yes, sir.

Q. Yes. Now, could you tell me what the time of the day was when you relayed this information on concerning these matters that you have given testimony about?

A. I would say between 2:40 and 3:00 o'clock. That is within twenty minutes after the time the individuals arrested were removed from the property.

Q. So what time of day was that?

A. They were taken from there approximately 20 minutes to 3:00.

Q. And this information that you have told us about, that was transmitted afterwards?

A. That was transmitted as soon as we could get the wheels in motion and remove him to San Francisco, yes.

(Testimony of Roy Erickson.)

Q. And that accounts entirely for the extent of your information about this matter, does it?

A. Yes, sir.

Mr. Gladstein: That is all, your Honor. Oh, just a moment. I am sorry. I have another question.

Q. I am correct, am I not, Mr. Erickson, you did not have nor did any of the agents who were with you at the house have any search warrant for the search of the premises, isn't that correct?

A. No, sir.

Q. When you say "No, sir", that is correct, is it not? A. That is correct, yes, sir.

Mr. Gladstein: That is all, your Honor.

Cross Examination

Mr. Schnacke: Q. Mr. Erickson, after the time of the arrest did you have occasion to check the telephone numbers listed to the address which appeared as the address of Janet Conroy on the automobile that was found at the cabin?

A. It was checked, yes.

Q. And do you know what that telephone number is?

A. That telephone number is Cypress 7-0394.

Q. And does the number "7-0394" correspond with the first number on the page headed by the letter "J"? A. Yes, sir.

Mr. Schnacke: That is all, Mr. Erickson.

(Witness excused.)

Mr. Gladstein: Mr. Shedd, please.

JOHN EDWARD SHEDD

called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: John Edward Shedd.

The Clerk: Please spell your last name.

The Witness: S-h-e-d-d.

Direct Examination

Mr. Gladstein: Q. You are an agent of the Federal Bureau of Investigation, Mr. Shedd?

A. That's right.

Q. And you were in August of last year?

A. Yes, sir.

Q. Did you and other agents take into custody the defendant, Patricia Blau? A. Yes.

Q. Will you tell us at what time of day that was? A. The time of the arrest?

Q. Yes.

A. Approximately 8:25 on the evening of August 27th.

Q. At what time of day did you get directions or instructions to make such an arrest?

A. Approximately 4:00 o'clock on the same afternoon.

Q. And from whom did you receive such direction?

A. From my immediate supervisor.

Q. Who was that?

A. Mr. Clifford—Harry Clifford.

(Testimony of John Edward Shedd.)

Q. Where were those instructions given you?

A. I received them over the radio.

Q. Where were you at the time you received them?

A. On the city limits of San Francisco doing leg work.

Q. Do you know whether the instructions that were given you were relayed from the office in San Francisco or some other place?

A. They were relayed—my instructions came from Control—Control in San Francisco.

Q. Where were you at the time that you received these instructions, approximately?

A. Well, that is what I would have to say—approximately. I would say out on Geneva Avenue or some place like that.

Q. What were the instructions?

A. The instructions were to proceed to the immediate area of 69 North 10th Street, San Jose, and conduct a surveillance, physical surveillance of a person by the name of Patricia Blau.

Q. Was that the name that was used in the instructions, now? A. Yes.

Q. Was there any other information given you that would tend to identify or describe her?

Mr. Schnacke: Your Honor please, I haven't objected up to now, but I think this preliminary information of instructions is immaterial and hearsay, objectionable.

The Court: I will sustain the objection to the last question. I think that is far afield.

(Testimony of John Edward Shedd.)

Mr. Gladstein: Q. Then what did you do, sir?

A. I went to the—I of course immediately proceeded to San Jose and arrived there approximately five or ten minutes past 5:00 that same afternoon.

Q. I am not sure I understand correctly. Did your instructions tell you to conduct a surveillance or to make an arrest at that time?

A. At that time I was told to conduct a surveillance.

Q. All right. And will you tell us what you did thereafter?

A. Shortly after I arrived there I took up a position in the immediate area, and approximately 5:25, the defendant, Patricia Blau, was observed by myself leaving the residence at 69 North 10th Street, San Jose.

Q. Yes, sir. Then tell us what happened thereafter.

A. Well, when she left she was carrying a suitcase and coat over her arm, and she proceeded to walk north on 10th Street.

Q. Pardon me for interrupting. How did you know it was Patricia Blau at that time?

A. Well, prior to this I had observed and was instructed—or I had observed Patricia Blau in Oakland, California, previously in the year, and was told that the woman I had seen on the street here on North 10th Street in San Jose, which was the same woman I had seen in Oakland, was one and the same person.

(Testimony of John Edward Shedd.)

Q. All right, will you proceed?

A. And this defendant proceeded to walk north on 10th Street, and I observed her intermittently between North 10th Street until she finally stopped walking and was standing on the corner of 13th and Julian Street in San Jose. That was approximately 5:45 p.m.

After about fifteen minutes I observed a light green Chevrolet coupe drive up to that corner. I observed the defendant step from the sidewalk to the side of the car. I saw the defendant get into the car and I saw them drive off.

Q. What did you do then?

A. Well, I immediately started to follow the subject, and I watched them take various turns in and around the general area, which lasted for about twenty or twenty five minutes before the automobile headed north on 17th in the direction of Oakland.

The car continued along 17th until it reached Highway 21, where it veered off to the right and headed in a northeasterly direction.

The car continued along that road until it came to Livermore cutoff, and cut off on the way to Livermore, and proceeded as far as Banta cutoff near Tracy.

At about that point the car stopped, and then it made several U-turns and used a very devious means of getting around these back roads out there in an open field.

Q. What do you mean by that, sir?

(Testimony of John Edward Shedd.)

A. Well, the car would drive 200 yards, make a U-turn and come back in the opposite direction, stop, make a U-turn again and go back again in the other direction.

So finally the car proceeded out to Highway 50 again and headed toward Stockton. On the outskirts of Stockton the automobile stopped again and both the defendant and the other occupant got out, stepped into a restaurant there, and sat at a table near the window and proceeded to eat. This was approximately eight o'clock, or ten minutes to eight, I would say. I correct myself. Ten minutes to eight.

Q. Can I interrupt you again? Up to that point you had no instructions to place her under arrest?

A. I had received no instructions but I had been advised by Control of our position, and so forth.

At approximately five minutes past eight or so, both the defendant and her companion came out, got in the car, and proceeded to drive through Stockton, downtown Stockton, and in downtown Stockton they continued to make these U-turns and drive around in circles for about ten minutes before the car headed out on the Modesto Road.

At a point about three or four miles, the car turned over to a—turned to another highway, the Mariposa Road, and headed east on Mariposa Road.

At this point we were following the car and I observed pieces of paper, or what appeared to be paper, white objects, flying from both the left side

(Testimony of John Edward Shedd.)

of the car and the right side of the car, and as I got closer some of it was—when I got up real close to the car, some of it was coming right by our automobile.

As a result, I called Control again and advised them what the situation was, and shortly thereafter I was advised to make the—well, we were advised to make the arrest. So we immediately turned on the siren and lights and proceeded to halt the vehicle.

It was some time before the companion of the defendant observed the sirens of the three cars involved, but the car was finally stopped at the side of the highway approximately twelve miles out on Mariposa Road from Stockton, and at that point the defendant was placed under arrest.

Q. What did you place her under arrest for?

A. The senior agent in charge at that time in the group placed her under arrest for—I heard them say myself just the word “accessory after the fact”, and I could not hear the rest of it because I was on the opposite side of the car and there was, of course, a little confusion at the time.

Q. Who was the senior agent in charge?

A. Mr. Charles Prelsnek.

Q. Of course you were in contact with the Control or central point?

A. Yes, I could hear them and they could hear me.

Q. Who was doing the communicating, you or Mr. Prelsnek?

(Testimony of John Edward Shedd.)

A. Well, it would vary, who was behind the car at the time.

Q. Sometimes you and sometimes he?

A. That is right.

Q. Did you yourself hear the instructions as to whom to arrest and on what charge?

A. Yes.

Q. I mean from the central office.

A. That is right.

Q. And what was that direction?

Mr. Schnacke: I object to that as being incompetent, irrelevant and immaterial, having no bearing.

The Court: I don't think this has any bearing on the matter. It is what was done. Doesn't make any difference what the instructions were.

Mr. Gladstein: Q. You had no warrant of arrest for the occupant of that car?

A. That is right.

Q. The same is true of all of you?

A. That is right.

Q. I take it it is also true none of you had a warrant authorizing a search of the occupants or contents of the vehicle?

A. That is correct.

Q. Now, you mentioned some pieces of paper. Did you ascertain what those were?

A. No. On that type of road and at the speeds that the cars were traveling it would be impossible to recover paper torn in small pieces.

(Testimony of John Edward Shedd.)

Q. You never did make any recovery of them and don't know what they are, is that correct?

A. That is correct.

Q. What happened at the time that you arrested—. By the way, did you arrest one or both of the occupants? A. We arrested one.

Q. And that was the defendant, Patricia Blau?

A. That is correct.

Q. And the other occupant was who?

A. Harvey Wilson Richards.

Q. You did not place him under arrest?

A. What?

Q. I say, you did not place him under arrest?

A. No.

Q. What did you do then at the time of the arrest?

A. Due to the location, we returned to the nearest city, which was Stockton. The companion of the defendant voluntarily returned with us. We drove to the resident agency there in Stockton with both the defendant and the companion, and at that point I stepped out of the picture. I wasn't in charge or anything and I had no further orders at that time, and that was the last time I observed the defendant.

Q. What time of day was that?

A. I could only guess at the time then. I am not sure as to what time that was, but it would be probably some time after nine o'clock in the evening—9:15 or 20.

Q. Prior to that time did the officers conduct a search of the person of the defendant?

(Testimony of John Edward Shedd.)

A. Would you say that again?

Q. Yes. Before you went off duty at nine o'clock did the officers conduct a search of Mrs. Blau?

A. The only search conducted of Mrs. Blau in my presence was the search of a handbag—a pocketbook.

Q. While you were present, then, no search was made of the automobile?

A. No search was made of the automobile at that time, shortly after nine o'clock.

Q. So that any search that may have been done would have occurred after you had gone?

A. No, I hadn't left, but my statement to you was that I did not see the defendant after 9:15.

Q. Oh, I am sorry. Now, were you present when a search of the car was made?

A. Yes, that is correct.

That was some time after you no longer—after the time you last saw the defendant?

A. That is right.

Q. Well, what time was it that the search was conducted?

A. Well, the search was conducted some time prior—about ten o'clock on that evening.

Q. Where had the defendant been taken?

A. I had no knowledge of where the defendant was.

Q. She wasn't released, was she?

A. Well, that is evident.

Q. I mean she had been taken in custody by some agent or agents?

A. That is right.

(Testimony of John Edward Shedd.)

Q. Who conducted the search?

A. Search of——?

Q. The automobile.

A. I conducted the search of the automobile.

Q. Did you ask the defendant for permission to do so? A. No, I didn't.

Q. Or anybody? A. No.

Q. Did you take into your possession any contents were? A. Yes.

Q. Was an inventory made of what the contents were? A. Yes.

Mr. Gladstein: Is that present, Mr. Schnacke? I think we can simply have counsel supply such inventory rather than have the witness try to remember from memory. I am satisfied the inventory would be more accurate, if that is all right with your Honor.

The Court: All right.

Mr. Gladstein: Q. I thought I had asked this question, but at the risk of repetition, it is correct that you had no search warrant to search the car?

A. That is right.

The Court: You said that already.

Mr. Gladstein: That is what I thought.

Q. One more question: Were you told whether or not a warrant for the arrest of Mrs. Blau had been obtained?

Mr. Schnacke: I will object to that as immaterial.

The Court: What did you say?

(Testimony of John Edward Shedd.)

Mr. Schnacke: I think it is immaterial whether this witness was told.

The Court: He said he had no warrant.

Mr. Schwartz: He said he had no warrant, so whether he was told there was a warrant or not doesn't seem to me to be material. I will withdraw the objection, though.

The Witness: Will you give me the question again?

Mr. Gladstein: Q. Yes. You have already told us that you yourself had no warrant to arrest her. I am simply asking you now whether you had been told there had been a warrant made, and if you were told you were to proceed under that authority.

A. I had no personal knowledge whether there was one in effect or not.

The Court: Anything else?

Mr. Gladstein: That is all except for the actual inventory of the contents.

Mr. Schnacke: Well, just a moment. Is there such an inventory?

(Colloquy inaudible to the reporter.)

Mr. Schnacke: There apparently is an inventory, your Honor, and we will attempt to supply it.

The Court: Anything else you want now?

Mr. Schnacke: No further questions.

Mr. Gladstein: That is all.

(Witness excused.)

[Endorsed]: Filed July 13, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 33740

UNITED STATES OF AMERICA, Plaintiff,
vs.

SHIRLEY KREMEN, also known as LEE KAP-
LAN, et al., Defendants.

REPORTER'S TRANSCRIPT

Monday, April 12, 1954

Before Hon. Louis E. Goodman, Judge.

Appearances: For the Government: United States Attorney, by Robert H. Schnacke, Esq., and Richard H. Foster, Esq., Assistant U. S. Attorneys. For the Defendants: Gladstein, Andersen & Leonard, by Richard Gladstein, Esq., and Norman Leonard, Esq. [1*]

The Clerk: United States of America versus Shirley Kremen, et al., for trial.

The Court: Both sides ready?

Mr. Schnacke: Yes, Your Honor.

Mr. Gladstein: Yes, Your Honor.

(Thereupon a jury was selected and sworn.)

The Court: Mrs. Workman will be alternate juror No. 1 and Mrs. Lilly alternate No. 2.

We will take a recess until 2:30 this afternoon,

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

members of the jury. However, you should bear in mind, please, particularly those of you who haven't had jury service, that now that you have been sworn to try this case it becomes your duty not to discuss the case or anything about it among yourselves, nor are you to let anyone else upon any pretext address you in any manner concerning this case or any phase of it.

Likewise, it is your duty not to form or express any opinion concerning the case until it finally reaches your hands for decision.

Now, when we reassemble at 2:30, you will go to the jury room provided for you. When you leave now the Crier will show you the jury room, and when you assemble for the various sessions of court that is where you will go. Then you will [3] also go there during the several recesses.

The purpose of that is that we do not like to have the jury in the hallways while the case is in progress, and therefore we have provided a jury room where you will be at all times when you are not in court.

We will now take a recess until 2:30.

(Thereupon this cause was adjourned to the hour of 2:30 p.m. this date.) [3-a]

The Clerk: United States versus Kremen, et al., for trial.

The Court: Do you wish to make an opening statement?

Mr. Schnacke: Yes, Your Honor.

(Opening statement by Mr. Schnacke and various motions made by Mr. Gladstein reported but not transcribed at this time.)

Mr. Schnacke: Roy Erickson.

ROY L. ERICKSON

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

A. Roy L. Erickson, E-r-i-c-k-s-o-n.

Direct Examination

Mr. Schnacke: Q. What is your occupation, Mr. Erickson?

A. I am a special agent for the Federal Bureau of Investigation, presently assigned to the San Francisco field office.

Q. Was that your occupation on August the 27th, 1953? A. Yes, sir.

Q. In the course of your employment did you have occasion to go to a cabin at Twain Harte, California, on that date? [4] A. Yes.

Q. What time did you arrive at that cabin?

A. I arrived in the area of the cabin about 5:00 a.m.

Q. With respect to visibility, what was the situation at that time?

A. When I entered the cabin area it was still

(Testimony of Roy L. Erickson.)

dark. By the time I was situated dawn was just beginning to break.

Q. Mr. Erickson, at a later time did you return to the area of the Twain Harte cabin and make certain measurements for the purpose of drawing a diagram of that area?

A. Yes, on March 12th, 1954.

Q. Would you identify these papers for me (handing documents to the witness)?

A. These are three sheets of paper which I used to draw three different things in the area where the cabin was located from measurements which I had obtained on my trip there March 12th.

Mr. Schnacke: May the three pages identified by the witness be marked as Government's Exhibit next in order?

The Clerk: As one exhibit, Mr. Schnacke?

Mr. Schnacke: As one exhibit, yes.

The Clerk: Do you wish them marked for identification or entered into evidence, Mr. Schnacke?

Mr. Schnacke: In evidence.

The Clerk: Plaintiff's Exhibit 1 introduced and filed [5] into evidence.)

(Whereupon three sheets of paper identified above were received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Schnacke: Q. Now, will you identify that document, please (handing document to the witness)?

A. This consists of three photostatic copies, one

(Testimony of Roy L. Erickson.)

of each of the three charts. However, they have been reduced to half size.

Mr. Schnacke: If Your Honor please, I have enough of the photostatic copies to which the witness has just referred to supply one to each member of the jury. I have supplied one to counsel for the defense and I have one available for Your Honor. It may be of assistance in following the testimony of this witness as to his activities at the cabin and in the cabin area. May a copy of these be given to each member of the jury?

The Court: Any objection?

Mr. Gladstein: I don't have any objection.

(Thereupon photostatic copies of Plaintiff's Exhibit No. 1 were distributed to the jury.)

Mr. Schnacke: Q. The first page of the diagram to which you have referred represents what, Mr. Erickson?

A. The first page represents generally the lot on which the cabin was located. It shows the general—the specific [6] dimensions of the lot there, to my limited ability, the shape of the lot.

It shows the roadway running below the lot, which is at the base of the hill. It shows the entrance driveway from this roadway into the lot on which the cabin was located, and a front roadway on the front terminus of the lot which goes by the area on this side of the hill but does not enter the cabin area as such.

Q. Both above and below the upper road you have labeled “wooded hillside”. Does that wooded

(Testimony of Roy L. Erickson.)

hillside extend to the left and to the right of the place where it is noted?

A. Yes. The land on all sides of the cabin, to the left, to the right and above it, were wooded. The land below it, immediately below it on the property, is wooded; but below what is noted as the "lower road" is a small valley which is not wooded.

Q. Now, you have designated only one cabin or building other than the outhouse building on this diagram. Within the area included by the diagram are there any other buildings?

A. Within the area included by the diagram there was none.

Q. What are the nearest adjacent buildings by direction and distance from the cabin here?

A. The upper road goes to a cabin which would be west or to the right of the diagram as looking at it. There is a cabin probably 100 to 150 feet beyond the end of the roadway, as [7] shown. There is also a small cabin on the lower road west of the property, or to the right of the map, and that again is probably 100 feet or so from the edge of the map.

Q. Are there any other cabins in the immediate vicinity?

A. No, not in the immediate vicinity.

Q. You have testified that on the morning of August 27th, at about five o'clock a.m., you came into this cabin area. By referring to this diagram, into what part of the area did you come?

A. I came into the area above the upper road, or at the top of the chart as depicted. That is a

(Testimony of Roy L. Erickson.)

wooded area with some heavy or large stone, boulders. The trees are reasonably large. They are limited in number, though. And I was in the area immediately above the road and at times on the road itself.

Q. Were you alone on this occasion?

A. No, I was with four other agents.

Q. And where were the four other agents located with respect to yourself?

A. We were stationed as near to each other as we could be without being observed; that is, either behind the next boulder or behind the next tree.

Q. From the place where you were stationed, what parts of the cabin could you observe?

A. From where we were stationed the hill is reasonably high [8] so we were above the cabin as such. We could observe what would be mostly the southwest side of the cabin and the southeast side of the cabin. We could observe the two sides clearly together.

Q. To clarify the designation of the sides, you mean the side nearest the top of the page as the southwest side and the left side of the cabin as the southeast side, is that correct?

A. That is right.

Q. Did you observe the parking and game area, as it is designated here?

A. Yes. As I have noted here, below the cabin is marked "wooded". That is wooded in the sense that there are several trees there. However, like above, they are limited in number.

(Testimony of Roy L. Erickson.)

The cabin itself is in a cleared area which is sort of terraced. The small lines drawn from the left to the right from the entrance driveway, they are supposed to depict a rise in the land or a terrace, and that entire area is cleared and flattened by the terracing. I could observe that entire terraced and cleared area at all times.

Q. And from your location, and after the visibility was sufficiently good, could you observe the outhouse?

A. Yes, the outhouse I could observe at all times.

Q. And could you observe the entrance driveway?

A. Yes. We could look down a good percentage, I would say one third of the way down the driveway itself.

Q. Approximately how far were you from the cabin itself?

A. I would estimate roughly 100 feet.

Q. And how long did you stay in that position?

A. I was in that position from about five o'clock in the morning until immediately after one o'clock. About, my time, about 1:04 p.m.

Q. You were in the area along there above the front road in the portion labeled "wooded hillside", then, from about five o'clock in the morning until about one o'clock in the afternoon?

A. That is right.

Q. And you were accompanied by four other agents during all that time, were you?

A. Yes.

(Testimony of Roy L. Erickson.)

Q. Now, at what hour was the visibility sufficiently good for you to observe the cabin and the adjacent area?

A. Well, shortly after I arrived, I would guess about 5:30 or thereabouts, it was possible to see through the clearing below; but in the wooded area it was around about six o'clock before it was clear enough to see other than reasonably good sized forms such as the size of a person or larger.

Q. Commencing at the time that the visibility was sufficiently good for you to see in the entire area, will you tell us who was the first person that you observed in the vicinity of [10] the cabin?

A. We saw no human activity whatsoever from the cabin proper or in the environs around it until about 9:30 when a man emerged from the entrance of the cabin, which I would say is on the left of the chart or on the west side of the cabin. He emerged from that doorway to the front yard, as I have it marked, or the terraced, cleared area.

Q. That is in the upper left hand part of the cabin where the label is "entrance"?

A. That is right.

Q. Is that man in the courtroom?

A. No, he is not.

Q. Did you later determine who that man was that you saw coming from the door at that time?

A. Yes. That man later——

Mr. Gladstein: Just a moment. I think the question has been answered by the witness saying

(Testimony of Roy L. Erickson.)

“Yes”. I suppose if he wishes to ask him further questions to establish a proper foundation——

The Court: I think I will sustain the objection.

Mr. Schnacke: Q. You did later determine who that man was? A. Yes, sir.

Q. Did you see him later that day?

A. Yes. [11]

Q. Was he identified to you at that time?

A. Yes, sir.

Q. By whom?

A. He was identified to me at that time—. Well, I should say later than that time. At the time of an arrest. I had to my satisfaction identified him as Robert Thompson.

Q. Did he ever acknowledge his identity as Robert Thompson to you?

Mr. Gladstein: Just a moment. I want to move to strike that answer as being a conclusion. No foundation. Non-responsive answer to the question.

The Court: He said to his satisfaction. That is his conclusion. That may go out. You can ask him how he determined who he was.

Mr. Schnacke: Q. On a later occasion did Robert Thompson identify himself as Robert Thompson in your presence? A. Yes.

Q. And when was that?

A. That would be, in my presence, to me, the following morning.

Q. And where was that?

A. That was in Alcatraz Penitentiary.

Q. So the man that you saw coming out of the

(Testimony of Roy L. Erickson.)

entranceway you have described here, on a later occasion identified himself to you as Robert Thompson?

A. Yes, sir. [12]

A. I will show you a color photograph and ask you if you can identify the man in that photograph?

A. Yes, sir. This is the man who on the occasion of the taking of this picture identified himself to me as Robert Thompson.

Q. Is that the man that you saw emerge from the cabin at ten o'clock that morning?

A. At 9:30, yes.

Q. And I will show you a black and white photograph and ask you if you can identify that?

A. This also is a photograph taken of Robert Thompson on the following day when he identified himself to me as such.

Mr. Schnacke: I will ask that the color photograph be received in evidence as Government's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 2 introduced and filed into evidence.

(Whereupon colored photograph referred to above was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Schnacke: And I will ask that the black and white photograph be admitted into evidence as Government's exhibit next in order.

The Clerk: Plaintiff's Exhibit 3 introduced and filed into evidence.

(Testimony of Roy L. Erickson.)

(Whereupon black and white photograph referred [13] to above was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Schnacke: Q. When Robert Thompson came out of the cabin at 9:30 that morning how was he dressed?

A. When he came out at 9:30 he was dressed in a pair of brown pants and a blue or dark blue type of sweater.

Q. What did you observe him to do after he came out of the cabin?

A. He came out of the cabin with a fishing rod, fly rod, and walked over to the approach of the entrance driveway in that cleared area and practiced casting with the rod for about ten minutes, at which time he laid the rod down on a small table which was set in the yard immediately in front of the entrance, and returned to the cabin.

Q. Did you observe him come out of the cabin after that time?

A. Shortly after he came out, about five minutes after, or about 9:45 a.m., a woman came out of the cabin and sat in an armchair which was situated near the entrance that the first person came out of and that this person came out of, and it was situated near the table I previously mentioned. She sat in that chair and appeared to be drawing or writing.

Q. Do you see that woman in the court room?

A. Yes.

Q. And where is she?

(Testimony of Roy L. Erickson.)

A. She is the woman sitting at defense counsel table in the [14] gray suit and black hat.

Mr. Schnacke: Identifying the defendant Shirley Kremen.

Q. And how long did she stay in the yard?

A. She sat in this chair for probably 15 minutes, and returned to the cabin, entering in the same entrance that she emerged from.

Q. And who next did you see in the area?

A. While she was sitting in the chair a man came out dressed in a pair of brown pants and sat on the ground off of the lowest terrace right by the entrance from which he and the other two emerged. He sat there for just a few minutes, and went back in about the same time as Mrs. Kremen went in.

Q. And do you see that man in the courtroom?

A. Yes.

Q. Which of the——

A. That is the man at the end of the counsel table, on the opposite side, in the light gray suit.

Mr. Schnacke: Identifying the defendant Carl Ross. [15]

Q. After Carl Ross came out of the cabin, whom did you next see?

A. The next person was again Mrs. Kremen, who emerged about a quarter after ten, and at that time she came out carrying clothing, apparently washed clothing, which she hung on a clothes-line stretched from the corner of the cabin nearest the entrance from which everyone had emerged to

(Testimony of Roy L. Erickson.)

what I have marked as the outhouse. The clothing was hung on that line and she immediately returned to the cabin.

Q. Did you observe what kind of clothing it was, as to whether it was man's clothing or women's clothing?

A. It was man's clothing, and a dish towel or some type of a towel.

Q. After 10:15 whom did you next observe at the cabin?

A. About 10:30 another man came out of the cabin and he just walked around the yard shortly, for a short time, and returned. He used the same entrance as the others had used, and he was dressed in only a pair of yellow swimming trunks or shorts of that nature.

Q. Do you see that man in the courtroom?

A. Yes.

Q. Which man in the courtroom is he?

A. That is the man at the counsel table, the opposite side from me, in the middle with the brown suit and the glasses.

Q. Identifying the defendant Coleman? [16]

A. Yes.

Q. After the defendant Coleman came out of the cabin, whom did you next see?

A. They were walking in and out of the cabin from then on several times, all four of those individuals. I did not keep an accurate record of their exits and entrances.

The next person that came out came out about

(Testimony of Roy L. Erickson.)

noon, twelve o'clock. That is, a person other than I had already seen emerge from the cabin, and he emerged from the same entrance that the others had been using.

Q. What time was that?

A. That was just about noon, twelve o'clock.

Q. Prior to the emergence of this new party at twelve o'clock, what had been the general nature of the activity of the other persons that you had seen other than as you have already identified them?

A. They came out as I would say people would normally come out of a place and talk among each other, relax on their various terraces or in chairs. There was another chair, a straight back chair of the type I am sitting on, which was also on that side of the cabin on the terrace.

Q. Then at noon you saw another person come out. Do you see that person in the courtroom?

A. Yes, that is the person on the opposite side of the counsel table, in the blue suit and the gray sweater. [17]

Q. Identifying the defendant Sidney Steinberg?

A. Yes.

Q. How was Sidney Steinberg dressed on that occasion?

A. When he came out he was dressed in a pair of pants only, a brown type of pants, khaki style, I think.

Q. Mr. *Harrison*, I will ask you if you can identify the photograph I am showing you now.

A. Yes, sir, this is a photograph of Mr. Stein-

(Testimony of Roy L. Erickson.)

berg that I took of him in the cabin at the time of the arrest on that day, August 27th.

Mr. Schnacke: I will ask that the photograph of the defendant Steinberg be marked next in order.

(Whereupon the photograph of Sidney Steinberg was received in evidence and marked Defendant's Exhibit No. 4.)

Mr. Schnacke: Q. In that photograph is the defendant Steinberg dressed as he was on the first occasion and that you saw him on August 27th?

A. Yes, sir.

Q. When Steinberg came out of the cabin what did he do?

A. Mr. Steinberg came out of the cabin and he pulled a chair up to the table I have mentioned as being near the entrance. He came out of the same entrance as the rest, and he sat at the table, apparently writing or drawing. He sat there for a considerable time, 15 to 20 minutes, during which time others [18] were outside or entered or left the cabin on the cleared area. After the 15 or 20 minutes or about a quarter to 20 minutes after twelve he got up and went back into the house.

Q. All of them returned to the house?

A. All of them at various times returned to the house, yes, sir. None of them ever left the property as such.

Q. Calling your attention to about five minutes after one on that day, who was present in your yard at that time?

A. Do you say about five minutes after one?

(Testimony of Roy L. Erickson.)

Q. Yes.

A. About five minutes after one, Mr. Thompson, Mr. Steinberg were together in the yard. Immediately before that time all five of those I had seen come from the cabin were sitting in the yard around the table. What they were doing I don't know, other than they appeared to be talking.

Q. Then all of them other than Thompson and Steinberg returned to the house?

A. The other three returned to the house just before 1:05, yes.

Q. At about 1:05 did you get instructions from your superior?

A. Yes. Earlier than that, actually about 12:45.

Q. Pursuant to those instructions what did you do?

A. Pursuant to those instructions I had been relaying the information that we were observing to an agent in charge of the operation. Those instructions were relayed by means of a [19] two-way radio, which is called a handi-talkie. We had been observing the people through binoculars and relaying the details as we observed them. About 12:30 we relayed the information that, to our satisfaction, two of the individuals were people we were satisfied as fugitives. We had relayed the information about the others coming in and out and so forth.

About 12:45 we received instructions to stand by, not to move, but to be prepared to assist approaching party, which was approaching by automobile. We were told that there would be an arrest effected,

(Testimony of Roy L. Erickson.)

that we would have to take the two who were there that we were satisfied were fugitives in our minds. We were told that we should also be prepared and that we would effect an arrest of all the parties there, since it was apparent from what we had reported——

Mr. Gladstein: I am going to object to this as a conclusion.

The Court: Yes, the statement, "Since it was apparent", from that point may go out.

Q. (By Mr. Schnacke): In any event, about 12:45 you received certain instructions and thereafter you took certain action, did you not?

A. Yes.

Q. What action did you take?

A. At the time automobiles could be seen coming in the [20] entrance driveway we were instructed to leave our cover positions on the upper road and on the wooded hillside and move down to the cleared area and assist in effecting the arrest of the people of the cabin.

Q. Did you do that? A. Yes, sir.

Q. About what time of day was it that you converged on the cabin?

A. According to my time it was 1:04.

Mr. Schnacke: Is this a convenient time to adjourn?

The Court: All right. I think perhaps we might adjourn until tomorrow morning. You can step down.

Members of the jury, I have some motions, legal

(Testimony of Roy L. Erickson.)

matters to dispose of with the attorneys tomorrow morning earlier. So you need not come at the usual time of ten o'clock but instead we will resume the trial so far as the jury is concerned at 10:30 in the morning. So please return here tomorrow morning at 10:30 and in the meantime bear in mind the admonition I have given you.

The Court will recess until 9:30 tomorrow morning.

Will you see that you get all 12 of those diagrams from the jury and return them to the Clerk?

(Whereupon an adjournment was taken until

9:30 a.m. Tuesday, April 13, 1954.) [21]

The Clerk: United States vs. Kremen, et al, motion to return seized property and motion to suppress evidence, further hearing.

Mr. Schnacke: If your Honor please, the Government has agreed with the attorney for the defendants that we would provide the witnesses who were acquainted with the facts surrounding and leading to the arrest of the defendant Patricia Blau.

There were two witnesses who have information bearing upon that point, one of them having information concerning matters at the Twain Harte cabin which were preliminary matters leading to the arrest. That agent is Roy Erickson. The other agent, who participated in and was present at the arrest, is the Agent Shedd. Both of those agents are present in court for the convenience of the defendant.

(Testimony of Roy L. Erickson.)

(Further proceedings upon motions reported but not made a part of this transcript, upon instructions of counsel.)

(Recess.)

ROY L. ERICKSON

resumed the stand as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows: [23]

Direct Examination—(Continued)

Mr. *Erickson*: Q. Mr. Erickson, when we left yesterday you had reached the time of about 1:05 p.m., and as I recall it you were on the hill, had received instructions to converge on the cabin, and you observed automobiles approaching the cabin through the driveway, is that correct?

A. Yes.

Q. And that was, then, at approximately 1:04 p.m., on August 27th, is that right?

A. Approximately, yes.

Q. Now, will you tell us what you did from that time on in connection with these defendants?

A. As I observed the automobiles coming up the driveway, I dropped what I was carrying, namely, the handi-talkie, and I came down the hillside, the wooded area, to the parking area, which is on the map.

Just as I came down over and dropped into the parking area, the first automobile came into the area from the driveway. Immediately, the agent in

(Testimony of Roy L. Erickson.)

charge jumped out of the automobile, issued the command to everyone present that we were agents of the F.B.I., and that those on the premises were under arrest.

At the time two of them, Mr. Thompson and Mr. Steinberg, were standing in the parking area or cleared area in front of the house. The other three were inside the house and were immediately removed to the outside. [24]

Then, after they were removed to the outside, individual agents examined—they assumed charge of the prisoners independently. I personally assumed charge of Mr. Rasi who emerged from the entrance where, as I spoke of yesterday, the people were entering and leaving. I asked him to face the building and raise his hands up against the walls of the building. I immediately, so-called frisked him. I removed from his pockets the contents, and then I placed handcuffs on his hands with his hands to the front.

At the completion of that I asked him to rest easy, stand easy, or sit wherever he wanted until the other details were taken care of.

When all of the people had thus submitted to arrest, the agent in charge made the announcement to them, which is the usual announcement by a police officer, that the people were being placed under arrest. He announced that there were warrants for Mr. Thompson and Mr. Steinberg, and he announced that we would have to hold the rest on charges of harboring.

(Testimony of Roy L. Erickson.)

Q. You stated that you conducted an examination or search of the defendant Carl Rasi?

A. That's right.

Q. And what did you find on his person?

A. Very little. There were——

Mr. Gladstein: (Interposing) Just a second. I note an exception, if Your Honor please, on the ground that the search [25] and any seizure thereafter was illegal and improper, and therefore I make the objection to the question.

The Court: Overruled.

The Witness: There were a few papers in his pocket and a small notebook.

Mr. Schnacke: Q. How was he dressed at that time?

A. At that time he was dressed in only a pair of trousers. I believe they were brown trousers.

Q. I will show you a notebook and ask you if you can identify that notebook? A. Yes.

Mr. Gladstein: Excuse me. May I have a running objection to this line of inquiry, if Your Honor please, upon the ground stated?

The Court: You mean—. This is from the defendant Rasi?

The Witness: Yes.

The Court: Same ruling.

The Witness: A. Yes. This is the notebook I took from the pockets of Mr. Ross.

Mr. Schnacke: I will ask that this notebook be introduced in evidence as Government's exhibit next in order.

(Testimony of Roy L. Erickson.)

Mr. Gladstein: I object for the same reason, Your Honor please.

The Court: Same ruling. [26]

The Clerk: Plaintiff's Exhibit 5 introduced and filed into evidence.

(Whereupon small notebook referred to above was admitted into evidence as Government's Exhibit No. 5.)

Mr. Schnacke: Q. I will show you a sheet of paper and ask you if you can identify that sheet of paper?

A. This also is a sheet of paper I took from the pocket of Mr. Rasi.

Mr. Schnacke: I will ask that the sheet of paper just identified by the witness be introduced in evidence as Government's exhibit next in order.

Mr. Gladstein: Same objection.

The Court: Well, what is the objection? Only on the ground of the search—unlawful search? I haven't seen it. What is the material?

(Document handed to the Court.)

The Court: Oh.

Mr. Gladstein: I will add, concerning my objection, the objection as to the incompetency, irrelevancy and immateriality, if the Court please.

The Court: I will overrule the objection.

The Clerk: Government's Exhibit 6 introduced and filed into evidence.

(Whereupon the sheet of paper referred to above admitted into evidence as Government's Exhibit No. 6.) [27]

(Testimony of Roy L. Erickson.)

Mr. Leonard: In addition to the objection by Mr. Gladstein, Your Honor, may the record show at this time we move to suppress Exhibits 5 and 6 on the grounds that they were illegally obtained from the defendant. May that motion be deemed made?

The Court: It may be deemed made and denied.

Mr. Schnacke: Q. I will show you a sheet of paper with envelope attached and ask if you can identify those documents?

A. These were also taken from the pocket from Carl Rasi, with the sheet of paper being in the envelope at the time.

Mr. Schnacke: I will ask that the documents identified by the witness be introduced in evidence as Government's exhibit next.

Mr. Leonard: We make the same objection, Your Honor, and renew our motion to suppress as to Exhibit 7.

The Court: It may be admitted. Objection overruled.

The Clerk: Plaintiff's Exhibit 7 entered into evidence.

(Whereupon sheet of paper with envelope attached was admitted into evidence and marked Government's Exhibit No. 7.)

Mr. Schnacke: If Your Honor please, may the exhibits just introduced as taken from the defendant Carl Ross be exhibited to the jury at this time?

The Court: Well, can't you read them?

Mr. Schnacke: Yes, I can.

(Testimony of Roy L. Erickson.)

The Court: Unless you want to display the physical [28] connection and want to hold them up, I don't see it is necessary taking up time passing each one around and having each juror read each one separately.

Mr. Schnacke: All right. The first document introduced is Government's Exhibit 5, a little black notebook with a number of pages throughout the book. I will read all of the material that appears in the notebook, insofar as I can read it. Some of it——

Would it be proper, Your Honor, for the witness to read it? I think the witness is better able to decipher some of the language than I am.

The Court: I am not prohibiting you from exhibiting the book if it becomes necessary, but if you take a writing that requires reading by the jury and pass it along, it takes a very long time.

Mr. Schnacke: Yes, I appreciate it does.

The Court: Counsel on either side can simply call attention to what they wish.

Mr. Schnacke: Q. Will you read the contents of the notebook to the jury, please.

A. Page 1 appears to read, line 1, "With Geo."—— apparently abbreviation for "George." "8/10," or August 10, I assume.

The next line reads, "1) Williams Cab."

The next line: "From 3rd to 8."

Next line: —I don't know what the first word would be. [29] The second——

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. Would the first word be "Weber?"

A. Maybe "Weber is Vaugn." And the next line: "Da Pazton (woman)."

"2) Other—O.K."

Next line: "3) See Geo—18th."

Next: "Tues—12:00."

Mr. Schnacke: Q. Seems to be "Tuesday" abbreviated and the number abbreviation for "12:00 o'clock," is that right?

A. Probably. Next line: "San Mateo."

Next line: "S.E. corner."

Next line: "5th—(Park)."

In the corner are my initials and the date that I took the evidence.

The Court: Are there many pages of this?

Mr. Schnacke: No, Your Honor. There are about eight or ten pages is all. The significance of the book lies only in two pages. Now, if there is no objection we can read those two pages and mark those in red, and may leave the balance of the book unread.

The Court: You can call attention to anything you want at this time and Mr. Gladstein, if you want to call attention to anything, you can do so.

Mr. Schnacke: Q. Will you read page 4 of the book, Mr. Erickson? Is that the page headed "George—27th?" [30]

A. Page 4, first line, "George" abbreviated, "27th."

Next line: "1) Meet Betty—SJ."

(Testimony of Roy L. Erickson.)

Next line: "6PM" and either "13th" or "3th."
The "M" and the "1" appear to be run together.
"& Julian."

Q. Would you read the next page?

A. The next page, page 5, first line: "J."

Second line, numerals "7-0394—home."

Next line appears to read, "Use 5-9494(3) out."

Next line: "4-4285 out."

Next line: "3-4538—off."

Q. Now, would you read the page captioned
"Public Library" or "Pub. Lib," which appears to
be page 11.

A. That page reads: "Pub Lib"—public library
abbreviated.

"8 PM." The next line reads: "October 17-24-31."

Next line, abbreviation for November "7-14."

The next line——

Q. Would that be "Novek?"

A. It seems to be. I would presume it is
"N-o-v-c-p," meaning "November copy—Newsweek."

The next line is apparently, "They—New Yorker."

The next line: "Do you mean—" I believe.

The next line: "Steve Novak."

Next line: "Yes. You must be Miller."

"Miller" is on the following line.

Q. Would you read—just a moment. [31]

Mr. Schnacke: Government's Exhibit 6 appears
to be a grocery list. I can read that, I think.

"Five dozen eggs. 10 pounds—" No, I can't read
it.

Can I see the original of No. 6?

(Testimony of Roy L. Erickson.)

"Five dozen eggs. 10 pounds of—" something indecipherable. "Five pounds onions. Garlic. Carrots. One-half ham butt, 8-9. 5 pounds boneless chuck. 2 pounds margine," and in the margin, "cheese, salami, liverwurst."

To the right there is, "oil, vegetables (canned), juice, fruit, 4 pounds coffee, tea, 2 pounds Bisquick, 3 milk, 2 buttermilk, chicken."

And in the lower right-hand corner there are Mr. Erickson's initials.

Government's Exhibit 7, as taken from the defendant Rasi, reads as follows:

"Dear Jim:

"8/24

"Enclosed is note to my Betty. In open envelope is some material which have written. If you care to read and comment, you are welcome. Please seal before you send off.

"The person on this end of arrangement is being instructed to break off with your lady until he makes certain other arrangements. As previously agreed, contact from your end to be [32] with S, with whom we are in contact. S will explain further and make necessary further arrangements.

"Regards,

"Jess,"

and in the lower right-hand corner is annexed Mr. Erickson's initials and the date August 27, 1952.

Mr. Schnacke: Q. Following your search of Mr. Carl Ross, what did you thereafter do?

(Testimony of Roy L. Erickson.)

A. Following my search of Mr. Ross, I then assisted in fingerprinting each of the prisoners and checking the fingerprints of Mr. Thompson and Mr. Steinberg with a copy, which is on what we call an identification order, that commonly seen in Post Offices and bulletin boards, and so forth, with people for whom we are——

Q. Well, without regard to that, what did you specifically, in connection with the defendants or in connection with Robert Thompson, do?

A. With Robert Thompson I check his fingerprints, that is all.

Q. I see. What did you do thereafter?

A. Then after checking the fingerprints of Mr. Steinberg, I photographed each of the defendants.

Q. And what was the next thing you did in connection with the defendants or the cabin?

A. Then I went into the house in order to see what there was relating to this matter. I entered the house at the entrance [33] the people had been using. I entered what would be the kitchen on the chart.

Q. Well, let's stop there for just a moment. The second and third pages of Government's Exhibit 1 represent a diagram that you have made of the interior of the cabin at which the arrests occurred, is that right?

A. Yes, sir.

Q. And the ladies and gentlemen of the jury have copies of those diagrams before them. The second page appears to be labeled "First floor" and the third page to be labeled "Second floor."

(Testimony of Roy L. Erickson.)

A. That's right.

Q. With regard to that diagram, as necessary to explain your testimony, will you tell us what you did after you entered the house?

A. I went through the utility room into the kitchen. I noticed the two stoves with food on them, food on the cabinet above the sink, food in the refrigerator—the normal type of food, bacon, eggs, milk, and so forth.

From there I went into the next room, which apparently would be a dinette or something of that type, where there was a table and chairs. In the corner was a cupboard containing dishes. On the table were two boxes, one large box and one smaller box.

The larger box—both boxes were open. The larger box [34] contained a mimeograph machine, the model and make of which was a Print-o-matic, and in the other box were stencil copies and paper for use on the mimeograph machine, along with the necessary ink.

There was also clothing on the chair. Along the wall there was some fishing equipment.

I then went into the living room. I noted the items of furniture which are shown on the chart: Chair, radio, davenport, and a television set. There were also minor things like a footstool and end table. There was a music rack in the corner near the radio.

I noticed there were clothes on most of the items. There was also some clothes on the floor. There was

(Testimony of Roy L. Erickson.)

under the desk a portable—Royal portable type-writer. In the desk were many volumes of phonograph records. There were also many papers.

From there I went on up the stairway to the second floor. That is shown on the third page of the chart.

At the head of the stairway was a closet. It was well filled with clothing. There was a box, paper box on the floor of the closet. It contained a considerable number of papers of various types. I thumbed through the papers.

Then I went into the bedroom, which would be the bedroom above the living room, or at the head of the chart.

Those closets contained clothes, principally men's clothes. [35] They contained several types of suitcases—army bags. There was also one suitcase in the closet with several documents in it and papers.

At the foot of the bed were three cardboard boxes, all containing papers which I looked through. On the bed was a brief case, an expansion type brief case. It was quite filled with papers and documents.

Also, there was a suitcase, a brown suitcase, on the bed, and it too contained documents. There was clothing a few items, on the bed.

On the dresser was a smaller cardboard box containing several documents. On top of it was a small zipper type brief case containing papers and documents. And just lying on top of the dresser was a pair of keys on one ring.

I crossed over into the other bedroom, which

(Testimony of Roy L. Erickson.)

would be above the kitchen side of the house, and this was the smaller one of the two. That contained clothing in the closet. It appeared to be essentially lady's clothing.

There was clothing also on the bed, and there were toilet articles on the dresser. Below the dresser was a standard model typewriter rather than a portable—Remington typewriter.

I then went back downstairs and went out through the porch entry, noting the porch entry had, on the porch were—I think there were four sleeping-bags, or sleeping mattresses and bags. [36]

I went down the stairway and walked over to the parking area where the two automobiles were. One automobile was a green, light green Chevrolet. I looked in the glove compartment quickly to see if there was anything of importance there.

There were some identifying documents showing the car registration at apparently the present time, and an earlier registration.

At the end of the parking area, near the outhouse, was a 1950 bronze-colored Ford. I looked in the glove compartment of that, also, and there were a couple of papers and a temporary or suspense receipt as registration.

Mr. Leonard: If Your Honor please, before counsel puts the next question, may I move to strike that last answer of the witness on the ground that there has been no showing that there has been any process issued for the rambling search which the wit-

(Testimony of Roy L. Erickson.)

ness just described he undertook. I move to strike on that ground.

The Court: The motion will be denied.

Mr. Schnacke: Q. After examining the automobiles, what did you then do?

A. I went over to the agent in charge and pointed out to him the general things I had observed. Principally mentioned the documents in these various boxes and suitcases. I told him that they appeared to involve considerable——

Mr. Gladstein: Just a moment. I am going to object to [37] that as hearsay.

The Court: Sustained. All he can testify is just what he did, not what he said he did.

Mr. Schnacke: Q. After making your report to your superior, what did you then do?

A. Following that, I was then instructed to prepare to take that material back with me to San Francisco.

Q. And pursuant to those instructions, what did you do?

A. I placed the boxes and suitcases and the material from the two cars in an automobile that was provided for me and went back to San Francisco with them.

Q. Prior to the time you returned to San Francisco did you hear any conversation between the special agent in charge or any of the other agents on the premises and the defendant, or any of them, with respect to the property in the cabin?

A. The agent in charge——

(Testimony of Roy L. Erickson.)

Mr. Gladstein: Just a moment. I think that can be answered with "yes" or "no," if Your Honor please.

Mr. Schnacke: Q. I asked if you heard any such conversation? A. Yes.

Q. And between whom was that conversation?

A. That was an announcement by the agent in charge to those we had held as prisoners.

Q. Would that represent all of the defendants with the [38] exception of the defendant Blau?

A. Yes, sir.

Q. And also Robert Thompson?

A. Yes, sir.

Q. And what was the announcement that the special agent in charge made?

A. The announcement was that we were concerned with the material in the cabin. He asked if any of the defendants would identify any of that which was theirs and gave them a chance to answer. They all at that time stood mute.

He then explained to them that they would be taken into San Francisco. It would be a ride of somewhere around five hours. Since they were dressed mostly in jist, the men in a pair of trousers and no uppers on, he suggested they may want to get in more comfortable clothes because they would be taken immediately to the United States Commissioner.

He pointed out to them that up until that moment it was their privilege to say nothing. He asked them again if they would identify anything there, or

(Testimony of Roy L. Erickson.)

specify anything they wanted us to take care of. At no time did any of them tell him what was theirs.

Q. In any event, irresponsible at, or at the time that announcement was made, you were in the presence of the special agent in charge and the five persons that had been arrested?

A. Yes, we were all grouped there. [39]

Q. Were you in a position to hear if any reply had been made? A. Yes.

Q. And you heard no reply at that time?

A. No, sir.

Q. What did you do? You said you had instructions in connection with the property that was obtained on the premises. What did you do in connection with that property?

A. As soon as the prisoners were removed there and an automobile could be brought in——

Q. About what time of day was that. [40]

A. They departed about 20 minutes to three. And we immediately brought in an automobile, placed the boxes and suitcases containing the documents into the automobile, along with the material from the two cars, and drove to San Francisco with it.

Q. I show you a document and ask you if you can identify that document?

A. This is one of the registration forms that was in the glove compartment of the Chevrolet.

Mr. Schnacke: I will ask that that document be

(Testimony of Roy L. Erickson.)

received in evidence as Government's Exhibit next in order.

Mr. Leonard: We object to it for the reasons heretofore stated, and move to suppress it on the ground it was illegally seized.

The Court: Overruled. It may be admitted.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Thereupon document referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Schnacke: Q. I will show you three documents clipped together, and ask you if you can identify those documents?

A. Yes. They were—these are three documents found in the glove compartment of the Ford. [41]

Mr. Schnacke: I will ask that they be received in evidence as Government's Exhibit next in order.

Mr. Leonard: We make the same objection, Your Honor, and move to suppress upon the same ground.

The Court: Overruled. It may be admitted.

The Clerk: Plaintiff's Exhibit 9 introduced and filed in evidence.

(Thereupon three documents referred to above were received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Schnacke: Q. I will show you a document enclosed in a cellophane container and ask you if you can identify that document?

A. This was also in the glove compartment of the Ford.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: I will ask that that document just identified by the witness be received in evidence as Government's Exhibit next in order.

Mr. Leonard: Same objection, Your Honor, and same motion to suppress.

The Court: Same ruling.

The Clerk: Plaintiff's Exhibit 10 admitted and filed in evidence.

(Thereupon document in cellophane container was received in evidence and marked Plaintiff's Exhibit No. 10.) [42]

Mr. Schnacke: Q. I show you a small yellow piece of paper and ask you if you can identify that document?

A. This was also in the glove compartment of the Ford.

Mr. Schnacke: I will ask that the document just identified be received in evidence as Government's Exhibit next in order.

Mr. Leonard: Same objection, same motion to strike. And I might also point out in connection with the documents, there is no showing of any connection with any of the defendants, and it is incompetent, in addition to the grounds we have urged upon the Court.

The Court: Well, I will overrule the objection. I don't know what the weight of the testimony is at this time.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

Mr. Gladstein: Excuse me, Your Honor?

(Testimony of Roy L. Erickson.)

The Court: I say, I am simply admitting the document in evidence. I don't know what the weight of it is.

(Thereupon yellow piece of paper referred to above was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Schnacke: Q. I will show you a photostat of a document and ask you if you have ever seen the original of that photostat? A. Yes.

Mr. Schnacke: May the photostatic copy be marked [43] Government's Exhibit for identification and bear the number next in order?

The Clerk: Plaintiff's Exhibit 12 marked for identification.

(Thereupon photostat referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Mr. Schnacke: Q. Mr. Erickson, do you know where the original of that document is, or do you know—did you ever have in your possession the original of that document? A. Yes, sir.

Q. And what was done with the original of that document?

A. I returned that to one of the attorneys for the defendants with the automobile.

Q. So that the original of that document is no longer in the possession of the Government, is that correct? A. Yes, sir.

Q. Now, where did you first see the original of that document?

A. It was on the window of the Ford.

Q. Of the Ford automobile seen at the cabin?

(Testimony of Roy L. Erickson.)

A. Yes, sir.

Mr. Schnacke: I will ask that Government's Exhibit 12 for identification, be received in evidence at this time.

Mr. Gladstein: Same objection, Your Honor.

The Court: Same ruling. Admitted. [44]

The Clerk: Plaintiff's Exhibit 12 admitted into evidence.

(Thereupon document previously marked Plaintiff's Exhibit No. 12 for identification was received into evidence.)

Mr. Gladstein: I meant to add the same motion to suppress, Your Honor.

Mr. Schnacke: May this be marked for identification, to bear the next number?

The Clerk: Plaintiff's Exhibit 13 marked for identification.

(Thereupon document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Schnacke: Q. I will show you Plaintiff's Exhibit 13 for identification, and ask you if you have ever seen the original of that document?

A. Yes, sir.

Q. And where did you first see the original of that document?

A. In the glove compartment of the Chevrolet, at the cabin in Twain Harte.

Q. Did you take possession of the original of that document? A. Yes, sir.

Q. And what did you do with it?

(Testimony of Roy L. Erickson.)

A. I returned that with the automobile to one of the attorneys for the defendants. [45]

Q. So that the original of that document is no longer in the possession of the Government, but has been returned to the defendants, is that correct?

A. Yes, sir.

Mr. Schnacke: I will ask that Government's Exhibit No. 13, for identification, be received in evidence.

Mr. Gladstein: Same objection and same motion, if Your Honor please.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 13 admitted in evidence.

(Thereupon document previously marked Plaintiff's Exhibit No. 13 for identification was received in evidence.)

Mr. Schnacke: Could I have Exhibits 8 to 13, please?

May I at this time read to the jury, Your Honor, the exhibits just introduced by the Government?

Government's Exhibit 8 is a State of California 1952 registration.

"Year 1952. Car registration, Anna May Shepard, 2201 Derby Street."

There is engine number. It describes the make of the car as Chevrolet. Six cylinders, Two-door coupe. The date issued is June 4th.

"First sold 7/50. Class AK."

And there is a tab number. "Year model, 1950." There is a [46] code number, and the automobile

(Testimony of Roy L. Erickson.)

license number appears to be 7B86733. And the fees paid appear to be \$1.00.

Signature of Anna May Sheppard on that document, and the usual material on the reverse side.

Government's Exhibit 9, Mr. Erickson said he found in the 1950 Ford.

First there is a little notation, a slip of paper reading "Indiana Lumberman's 5/10/5—\$500 MP."

Under that "Nathan Citron, Agent. San Jose, \$65."

Under that, "San Jose Ford Sales Company," a bill form. "375 South Market Street, San Jose," with a telephone number, and date August 6th, 1953.

"Sold to Janet Conroy. Address, 69 North Tenth Street."

Various columns. Under "Articles" it reads, "Cash \$200". The numbers are written across it, "3G1606," and under that it says, "a/c 113".

In the lower left-hand corner it reads "Olsen", and in the lower right-hand corner it reads, "\$200," and it bears Mr. Erickson's initials and a date.

The third document in that exhibit, the caption is "Retail Buyers Order and Invoice, San Jose Ford Sales Company, 375 South Market Street, San Jose, California. Salesman, W. J. Olsen. Date, August 6th, 1953. Purchaser, Janet Conroy. Address, 69 North Tenth Street, San Jose." [47]

"Enter my order for one 1950 Ford V-8, Custom Club Coupe, color bronze."

There is a rubber stamp "Guarantee" written across it.

(Testimony of Roy L. Erickson.)

The "cash delivered price" is shown to be \$1,125. There is a notation, "replace timing gear". The total is shown to be \$1,125, sales tax \$39.38, license or license transfer \$1.00, or a total price of \$1,165.38.

There is a deposit of \$200. "No trade".

"Cash on delivery \$965.38. Total down payment \$1,165.38. Insurance \$65. Total \$1,230.38."

Bears the signature "Janet Conroy", plus other printing on the form that does not appear to be material.

On the reverse of that there are certain writings in pencil that appear to have no meaning to me. I can read them. Looks like, "M. H. O. R. H., 156413, body BH 72 B, GB2L14303."

Then there appears to be a subtraction of 965 from the \$1,000, leaving \$35, and under that the number "34".

Government's Exhibit 10 is a policy of holder's identification: "Indiana Lumbermen's Mutual Insurance Company. Insured, Janet Conroy. Address, San Jose, California. Auto name, Ford. Motor number HORH 156413," which I think is the same that was on the reverse of that last page.

"Expires August 7, 1954." There is a space for signature, but no signature appears. And the policy number is "5565769." It recites that, "This card identifies the bearer and [48] authorizes acceptance collect—" well, identifies the policy holder.

On the reverse of it there are instructions in case of accident: Name of the insurance company, and on the cellophane folder in which it is attached is

(Testimony of Roy L. Erickson.)

the name "Nathan J. Citron, insure today, be sure tomorrow, 93 East San Antonio, San Jose, California," and a telephone number.

Government's Exhibit 13 is a registration certificate covering a 1950 Chevrolet, two-door coupe. The engine number is HAA786026. License number 7B86733. There is registration to Gilbert G. Byrne, 169 Inner Circle, Redwood City. License transfer fee of \$1.00, and signature of Gilbert G. Byrne on the reverse side. The usual printed material contained on a registration certificate.

Government's Exhibit 12 is a document that reads on the reverse "Temporary permit. Attach to lower right-hand corner of windshield."

On the face of it it says, "Suspense receipt, State of California, Department of Motor Vehicles, Division of Registration."

It appears to bear the seal of the State of California. A number in the upper right-hand corner. Covers a Ford 8 engine BORH156413, and shows the registered owner as "Janet Conroy, address 69 North Tenth Street, San Jose." License number 3G1606. Year 1953. State of California check mark and [49] a column saying CK.

There are three places, "cash, check, money order", and the "check" is checked.

"Remarks Bu. No. 8." In the lower left-hand corner is a cashier's certificate with the initials "J. M." and the name appears to be indecipherable. "Number 09. San Jose 016," and the date typed in,

(Testimony of Roy L. Erickson.)

"8/13/53," and also bears Mr. Erickson's initials and the date.

Government's Exhibit 11 is a little sheet of yellow paper: "The car is in the parking lot down the street. Use it as much as you like but be careful," and the "be careful" is underlined.

"Good luck, Janet". It bears Mr. Erickson's initials and the date.

Is this a convenient time to adjourn, Your Honor?

The Court: Do you have other documents to identify?

Mr. Schnacke: Yes, Your Honor, there will be considerable more.

The Court: Well, we will meet again at 2 o'clock, members of the jury. Please return at 2 o'clock and bear in mind the admonition of the Court.

(Thereupon this cause was recessed to the hour of 2 o'clock p.m. this date.) [50]

ROY L. ERICKSON

resumed the stand as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Schnacke: Q. Mr. Erickson, on August 27th of last year, on the day of the arrest about which we have been speaking, did you have occasion to photograph the cabin and the surrounding area?

A. Yes, sir.

(Testimony of Roy L. Erickson.)

Q. I will show you five photographs and ask if you can identify those photographs?

A. Yes, these are five photographs I took of the area outside of the cabin.

Mr. Schnacke: I will ask that the five photographs be introduced in evidence as Government's Exhibit next in order. May each of the photographs be separately numbered? I think that is as convenient as sub-lettering them.

(Whereupon the photographs referred to were received in evidence and marked respectively Government's Exhibits 14, 15, 16, 17 and 18 in evidence.)

Mr. Schnacke: Q. Mr. Erickson, I will show you People's [51] Exhibit No. 14 and ask you what that photograph depicts, and if you wish to refer to your diagram and tell where you were and what area is covered by that diagram you may do so.

A. This is a photograph taken of the hill and property on which the cabin was located from the open area at the bottom of the hill of which I previously spoke.

Mr. Schnacke: The photograph is relatively large and I think if I hold it before the jury they will be able to observe it.

The Court: Pass it if you wish.

Mr. Schnacke: At some later time it may well be the jurors would care to look at it, but at this time I think it is sufficient to give a general impression of the area from that photograph. If any juror cares to look at it more carefully, he or she may

(Testimony of Roy L. Erickson.)

raise his or her hand and we shall present it for examination.

Mr. Schnacke: Q. Mr. Erickson, I will show you Government's Exhibit No. 15 and ask you what that picture depicts and from what part of the property that picture was taken?

A. This is a photograph of the cabin taken from the ridge at the edge of the parking and game area.

Mr. Gladstein: Your Honor, may I ask, has it been testified when these photographs were taken?

Mr. Schnacke: Q. You have testified they were taken on [51] the day of the arrest, is that right?

A. That is right.

Q. I show you Government's Exhibit No. 16 and ask you what that picture depicts and where you were when you took that picture?

A. This is a photograph looking up the end of the entrance driveway into the parking and game area at the two automobiles and a ping pong table on the parking and game area.

Q. Would you give me the same information with respect to Government's Exhibit No. 17?

A. This is a photograph of the cabin and the clearing in front of it taken from the position we were in on the upper ridge and above it.

Q. That is from the position where you were from sunrise that morning up until the time of the arrest, is that what you mean?

A. That is correct.

Q. And looking toward the cabin?

(Testimony of Roy L. Erickson.)

A. That is right.

Q. Would you give me the same information with respect to Government's Exhibit No. 18?

A. This is a photograph from the entrance driveway looking into the cabin. It is taken from, oh, 25 or 30 feet down the driveway.

Mr. Erickson, you testified that on your initial [52] examination of the house you found certain containers with documents in them, that you examined them briefly on that occasion, and that you did something with them later on. What was the action that you took with respect to those documents and those containers at a later time?

A. I took them into our office and placed them in a tall wardrobe-type cabinet in the room to which I am assigned. The cabinet was placed there for those documents and contained nothing else, and was kept under lock and key and still is.

Q. Who had the key to that?

A. I had one and there is an office key.

Q. Did they remain in that cabinet until they were turned over to me? A. Yes, sir.

Q. Mr. Erickson, I will show you what appear to be two keys and ask you if you have ever seen those before?

A. These are the two keys I mentioned as having been lying on the dresser in the bedroom above the living room.

Mr. Schnacke: I will ask that those keys be marked Government's Exhibit next in order for identification only.

(Testimony of Roy L. Erickson.)

(The keys referred to were thereupon marked Government's Exhibit No. 19 for identification only.)

Mr. Schnacke: Q. I will show you a document and ask you [53] if you can identify that document? A. Yes, this is a document——

Mr. Gladstein: Just a moment.

Mr. Schnacke: I will withdraw that question.

Mr. Schnacke: Q. I will ask where you first saw that document?

A. I first saw this document in the expansion briefcase I previously mentioned as having been on the bed, in the bedroom above the living room.

Mr. Schnacke: I will ask that the document just described be received in evidence as Government's exhibit next in order.

Mr. Leonard: Objected to, if Your Honor please, on the ground it is incompetent, irrelevant and immaterial. There is no foundation laid and there is no showing that any process or warrant was issued to constitute a legal search.

The Court: Do you propose to connect this up?

Mr. Schnacke: I propose to connect up the name, Your Honor, to the name of one of the defendants found at the cabin. This is a document found at the cabin and a document which the Government believes is one of the instrumentalities used in the commission of this offense.

The Court: I will overrule the objection.

(Testimony of Roy L. Erickson.)

(The document referred to was thereupon received in evidence and marked Government's Exhibit No. 20.) [54]

Mr. Schnacke: Q. I will show you a card and ask you when and where you first saw that card, if you have seen it before?

A. I saw this in the expansion brief case where the last exhibit was found.

Mr. Schnacke: I will ask that that card be received in evidence as Government's Exhibit next in order.

Mr. Leonard: Same objection as to the previous exhibit, Your Honor.

The Court: Same ruling.

(The card referred to above was thereupon received in evidence and marked Plaintiff's Exhibit No. 21.)

Mr. Schnacke: Q. I will show you another card and ask you if you have ever seen that before and if so when and where?

A. This also was found in the expansion brief case in which the previous two exhibits were found.

Mr. Schnacke: I will ask that that card be received in evidence as Government's exhibit next in order.

Mr. Leonard: Same objection as to the previous exhibit, Your Honor.

The Court: Same ruling.

(The card referred to above was thereupon received in evidence and marked Government's Exhibit No. 22.) [55]

(Testimony of Roy L. Erickson.)

Mr. Schnacke: May I briefly describe the exhibits that have just been introduced into evidence? Government's Exhibit 20 is on a Treasury Department form captioned "Application for Social Security Account Number." The applicant is shown as Robert E. Newman, an address in Berkeley, and it bears what appears to be a signature, Robert E. Newman, with miscellaneous information as required in the form.

Government's Exhibit 21 is a Social Security card bearing Social Security Account No. 56-146-7492, bearing the name Robert E. Newman, 2001 Alston Way, Berkeley, California.

Government's Exhibit 22 is a library card on the free Public Library of New Haven, bearing the name Robert E. Newman, 195 Sherman Avenue.

Mr. Schnacke: Q. Mr. Erickson, I will show you a group of cards and ask you if you have ever seen those before, and if so when and where?

A. Yes, these were found in a zipper brief case on the dresser in the bedroom above the living room side of the house.

Mr. Schnacke: I will ask that those cards as a group be received in evidence as Government's exhibit next in order.

Mr. Leonard: We make the same objection, Your Honor. They are not connected up with any of the defendants and there is no showing of the process by which they were seized. It is incompetent, irrelevant and immaterial.

The Court: I asked counsel if they were going

(Testimony of Roy L. Erickson.)

to be [56] connected up. If they are not, they will be stricken.

Mr. Schnacke: These involve a different name and I will assure Your Honor that they will be connected up.

The Court: Overruled.

(The cards referred to were thereupon received in evidence and marked Government's Exhibit No. 23.)

Mr. Schnacke: Q. I show you a small card and ask you if you have ever seen that before, and if so when and where?

A. Yes, I found this in the drawer, the center drawer of the desk which is shown on a chart to be located in the living room on the first floor of the house.

Mr. Schnacke: I offer that card in evidence as Government's exhibit next in order.

Mr. Gladstein: I make the same objection. May it be deemed also that our motion to suppress is addressed to this and the preceding exhibits?

The Court: Yes, you may have a continuing motion to that effect.

Mr. Gladstein: Thank you.

(The card referred to was thereupon received in evidence and marked Government's Exhibit No. 24.)

Mr. Schnacke: Q. I show you a small green piece of paper and ask you if you have ever seen that before, and if so when and where?

A. Yes, I found this in the same drawer of the

(Testimony of Roy L. Erickson.)

desk in the [57] living room as I found the previous exhibit.

Mr. Schnacke: I will ask that that be introduced in evidence as Government's Exhibit No. 25.

Mr. Gladstein: The same objection and motion, Your Honor.

The Court: Very well, same ruling.

(The piece of green paper referred to above was thereupon received in evidence and marked Government's Exhibit No. 25.)

Mr. Schnacke: With Your Honor's permission I will describe to the jury the items just introduced.

Government's Exhibit No. 23 are printed cards. There are five cards. They all read the same:

"Joshua Newberg, teacher of violin, mandolin, 1224 Windemere Avenue, Menlo Park, by appointment, DAvenport 3-2604."

The same text appears on each of the cards.

Government's Exhibit No. 24 is another Social Security card bearing No. 54-948-3623, and the name of Joshua Newberg, 1514 MacDonald Avenue, Richmond 5, California.

Government's Exhibit No. 25 is a State of California Resident Citizen Fishing License made out in the name of Josh Newberg, 1224, and the street looks like "W-e-n-d-e-r-a" Menlo Park, which I take it is meant to be Windemere, but it does not appear to be that. It sets forth a description: Color of eyes, sex and a signature, which appears to read Joshua Newberg. That [58] is a sporting fishing license that expired December 31st, 1953.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. Mr. Erickson, I will show you a notebook and ask you if you have ever seen that before, and if so when and where?

A. Yes, this is a notebook that I found in the expansion brief case on the bed in the bedroom above the living room.

Mr. Schnacke: I will ask that that notebook be received in evidence as Government's exhibit next in order.

Mr. Gladstein: I make the same objection, if Your Honor please, and the same motion.

Mr. Schnacke: This document, if Your Honor please, I think speaks for itself, being found under the circumstances under which it was found at the cabin.

Mr. Gladstein: I do not understand that remark and I ask that it be stricken, if Your Honor please. It is not a legal argument.

Mr. Schnacke: I will withdraw the remark, if Your Honor please, if it disturbs counsel.

The Court: I will overrule the objection.

(The notebook referred to above was thereupon received in evidence and marked Government's Exhibit No. 26.)

Mr. Schnacke: If Your Honor please, I would like to read this exhibit to the jury. I will say to you first it is a small notebook with what appears to be ball-point pen writing [59] on both sides of many pages and with certain inserts connected with it, and I will apologize for stumbling on it because some of the writing is not too legible.

(Testimony of Roy L. Erickson.)

On the first page it appears to read: "Arne Kerr," a big letter M for Margaret, and under that a small c for Charley in parenthesis, and No. 3774. Under that "SW" and what apparently was corner, "cor." only the c appears to be visible now.

Mr. Gladstein: Your Honor, I am going to object to the "apparently." It is not apparent to me. Does Your Honor care to look at it? The letter "c" is there.

Mr. Schnacke: I thought I saw that as "cor" under there. I may be in error.

The Court: If you want to pass it to the jury maybe at a later time—I do not know what your plans are in connection with these documents. It is hard to say now, whether it is better for you to submit them to the jury or you to try to read them. Counsel says some of it is not clear.

Mr. Schnacke: I will withdraw any suggestion that that is anything but a "c." I will proceed to read until I run into further objections, if that is satisfactory to Your Honor.

Mr. Gladstein: The only objection I had was that counsel was interpolating something that was not on the document, that is all.

The Court: If there is any necessity for doing that you [60] had better pass the document to the jury, Mr. Schnacke. Otherwise read it.

Mr. Schnacke: We can pass the document at some later time. I will read such parts of it as I can read. Any illegible parts I will omit. There is a word I can't read, and then it appears to say,

(Testimony of Roy L. Erickson.)

“Stand alone.” That is in parenthesis. Under that it says, “Ask for Mike C—Don Wol 0869 is NS on H Street.”

Below that it becomes difficult to read, but I believe it says, “Ron or Wilk William calling. Did Mr. Applegate—” and an illegible word—oh, “call you about your house. Reply. We have changed our mind. Time 8:30.”

Then an illegible word, followed by what appears to be “corner,” and then “S. A.,” an illegible letter, followed by “Ave” and “Jefferson,” and below that the word “more.” Mr. Erickson’s initials are in the corner of that page.

Continuing on the next page, “ID each next week. Are you Williams? Yes. My name is Jim,” or what appears to be “Joan,” and an illegible name beginning with the letter B and appearing to end with the letter “Y.” The word “Alt.” “They will call, No. 1,” what appears to be “Broadway 8248; No. 2,” ditto marks, “18831, at 9:30 P.M., Broadway at—” and an illegible word.

The next page has some matter at the top that is illegible because it has been stricken. It is followed by “Mrs. Helen V. Williams,” and “C” in parenthesis, 4366, and an unidentifiable word apparently beginning with the letter R, a capital M for [61] Margaret, and the next line “1,” and some unidentified symbol followed by “7:00 P.M.,” the word “sign.” What appears to be, “RW City,” over which is written “Mabel,” and on the right margin “birth-

(Testimony of Roy L. Erickson.)

day,” followed by “PH,” and below that what appears to be “arrive Mex.”

Under that a word spelled as follows “B-a-s-t-r-a-n-i-n,” and a symbol in parenthesis. Under that “5751 Thompson Court,” and “Ask for Charles Destrain. You are Mr. & Mrs. Povly.” Then what appears to say, “See over at the bottom of the page.”

On the next page the initial M, the word “new, after notice, Mrs. Olive B. duB(C) 2866 Spruce Street, Boulder;” below which it says “24” and an unidentifiable word.

Below that, “Comes to,” and an unidentifiable word followed by “Avenue.” Below that an unidentifiable word followed by the letter “B, 7:00 PM and 5:30 or John Will.”

The next page is captioned “Joe Salmos,” the letter “C,” a small c in parenthesis, and the number “2072.”

Below that a small c in parenthesis, “P. H. Williams M,” the number “9245,” under that “S. R.,” with something stricken out and a hyphen and an S, “old statue” in parenthesis, “return, add “Sol.”

We next find the word “Ralph” at the head of the page, small c in parenthesis, followed by an “M” which is underlined, and then two unidentifiable symbols followed by “William C.,” and it appears to be “Schied.” Under that “7888.” “No. G (old [62] no)” and an unidentifiable word, a line drawn across under that, the letter “C” and a small “c” in parenthesis, “Joe Hanson, 923 North Clark Street,

(Testimony of Roy L. Erickson.)

shop second floor. Be sure you are speaking to him. You are Mr. Nelson, a friend of Mr.," and an unidentifiable name. The end of the quotation marks.

The next line starts with an unidentifiable word followed by "Excuse to get him aside such as getting," and then in parenthesis "Over an old desk refinished," and then in capital letters and underlined, "Good only if Ralph speaks. Write in advance," and in parenthesis "two weeks."

On the next page we have the word "Wash, Ed Harris," the number 0671, a small "c" in parenthesis, "SO Park Ave., Tac" or "Tas" under that.

Attached to that page it reads, "8:30 PM standard." Below that "Chehalis." Below that, "one block south of bus depot is triangle park with exhibit of ancient logging equipment," parenthesis, and below that "on," and then "Hwy."

Just a couple of more pages, Your Honor.

Attached to a blank page in the book is the word "Regis, 50 percent," and an unidentifiable word and what appears to be "meet." Below that "dues, September 1, begin," a per cent sign, followed by "Okay."

Attached to a blank page, some two pages further is a typewritten sheet with certain portions removed. You can see the parts cut out. It reads, "Time, No. 1, 8:00 PM, No. 2, [63] 10:30 PM, place Ashby and College, drugstore corner, ID. His name Harold Maxwell. Person approach, John Ludford." And then there are some stars across. Below that it reads, "For appointment call," and a part of the

(Testimony of Roy L. Erickson.)

work can be read "Offic." The balance of the line there is removed except for the words "or" or the letters "or" at the end of that line.

The first part of the following line is removed, and then it goes on, "Ask for appointment for John Ludford, who has a heart condition and wants an electrocardiogram taken. He will make every effort to be at the appointed time and place on the day the call is received. The call to him should be made before 7:00 PM if possible. If the 8:00 PM appointment fails, he will be there at ten thirty or on following days until contact. He will arrive at the corner carrying two white bags."

In the corner are Mr. Erickson's initials and then on the last page on which there is any writing there is the caption, "To Mollie." Below that, "Ralph and Breta M," and something scratched out that I can't read. Below that "Phil." The next line, "Joe," a word I can't read that begins with a letter "A" followed by "MNC." Below that "W" with a dash, something stricken followed by "Sam O," a dash, "O Lady, Phil," a dash, something stricken in ink, followed by a word in pencil that seems to be "Sauna," which I can't otherwise decipher. [64]

Mr. Gladstein: If Your Honor please, now that counsel has read that, I will say I haven't examined it before in any detail, and I now move to have it all stricken on the ground it isn't probative of any issue raised by this indictment. There is no proper foundation.

The Court: Well,——

(Testimony of Roy L. Erickson.)

Mr. Gladstein: It appears to be something offered, some general thing of some kind which doesn't relate to the issues that any defendant has been charged with.

The Court: It was offered and admitted as a document found at this place.

Mr. Gladstein: It was received as such, but my point goes to an additional ground than the other grounds heretofore urged, and that is that the mere presence of a notebook or some document at that time and place wouldn't in and of itself make it material, competent and relevant to some issue raised by the indictment.

The Court: It is pretty early to say that. I can't rule on that now.

Mr. Gladstein: Very well.

The Court: You can move to strike it if it isn't connected up, if it doesn't have some relevancy later on.

Mr. Gladstein: Very well.

Mr. Schnacke: Q. Mr. Erickson, I will show you a small scrap of paper and ask you if you have ever seen that before, [65] and, if so, when and where?

A. Yes, I have. I found this in the zipper briefcase that was on the dresser in the bedroom above the living room.

Mr. Schnacke: I will ask that that paper be received in evidence and marked Government's exhibit next in order.

Mr. Gladstein: May I examine it for a moment?

(Testimony of Roy L. Erickson.)

Yet, I will make the same objection to this as has been heretofore made to similar documents, if your Honor please.

The Court: I think these documents in some way are going to be connected up further.

Mr. Schnacke: Your Honor please, the offer at the present time is on the basis of their being found in the cabin. This particular document, as well as all of the documents that we have introduced so far, will be connected up.

That is not necessarily true of every document that we will heretofore offer. I am offering them at this time as having been found in the cabin in the presence of these defendants.

Mr. Gladstein: Your Honor, I think that is a misstatement already. I don't understand from this witness' testimony that any of these documents were taken from the house in the presence of any of the defendants. Perhaps that was just an inadvertence on counsel's part.

At the same time, I would like to request if the Court would ask Mr. Schnacke to do this, that he tell me when they [66] are offered that they have no intention of connecting them further, that he would be good enough to advise us of that, because otherwise I assume he is going to do some connecting.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 27 introduced and filed into evidence.

(Testimony of Roy L. Erickson.)

(Thereupon document referred to above was received in evidence and marked Plaintiff's Exhibit No. 27.)

The Court: Where did you say this was found?

The Witness: In the briefcase on the dresser.

Mr. Schnacke: Q. Mr. Erickson, I will show you another notebook and ask if you have ever seen that before and, if so, when and where?

A. Yes. I also found this in that briefcase that was on the dresser in the bedroom above the living room.

Mr. Schnacke: I will ask that that notebook be received in evidence as Government's Exhibit next in order.

Mr. Gladstein: Same objection, if Your Honor please.

The Court: Same ruling.

The Clerk: Plaintiff's Exhibit 28 introduced and filed in evidence.

(Thereupon notebook referred to above was received in evidence and marked Plaintiff's Exhibit No. 28.) [67]

Mr. Schnacke: Q. Mr. Erickson, you mentioned earlier that on your examination of the cabin you discovered that there were two typewriters on the premises. Will you tell us again what type of typewriters they were and where you discovered them?

A. One was under the desk on the first floor of the cabin in the living room. That was a portable Royal typewriter.

The second was found on the second floor of the

(Testimony of Roy L. Erickson.)

cabin, in the small bedroom that was more or less above the kitchen side of the house, and it was under the dresser. That was a Remington upright or standard style of typewriter.

Q. In connection with those typewriters, did you thereafter have occasion to make certain tests?

A. I took specimens of the type from them, yes.

Q. I will show you a group of typewritten pages and ask you if they are the specimens that you took from one of the typewriters found in the cabin?

A. Four sheets were taken from the Remington typewriter on February 16, 1954; and the remaining 12 were taken on March 17, 1954, from the same typewriter.

Q. Now, Mr. Erickson, those sheets, as I understand it, contain meaningless matter typed out simply to test the typewriter, is that correct; or to give adequate samples of the work done by the typewriter?

A. That's right. [68]

Q. Have those typewriter samples been in your possession since the time you made them?

A. Except for the period they were transmitted to our laboratory in Washington.

Q. You sent them to the FBI laboratory in Washington, D. C.?

A. That's right.

Q. And were they returned to you by that laboratory?

A. Yes.

Q. And they have been in your possession since that time until you gave them to me?

A. That's right.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: While counsel is examining those—I intend to offer those in evidence, Your Honor please, but counsel is looking at them carefully—I will ask the witness to examine these other type-written pages and request that he tell us what they represent?

A. Nine of these pages were taken as specimens from the Royal Portable typewriter on February 15th, 1954. The remaining seven were taken from the same typewriter on March 18, 1954.

Mr. Schnacke: At this time I offer as evidence, solely as samples of the characteristics of the Remington Noiseless typewriter found in the cabin, the document Mr. Erickson described as the sample he had taken from the Remington Noiseless typewriter. [69]

Mr. Gladstein: I wish Your Honor would examine the contents before ruling. I make more or less the same objection, but I think particularly in view of the content they should not be received in evidence, although I understand counsel is offering them merely as a sample of the kind of typewriting done on the two typewriters.

The Court: Not for their contents?

Mr. Schnacke: Not for their contents, Your Honor.

Mr. Gladstein: But I don't see how you can separate the contents in any way.

The Court: Well, let them be marked for the limited purpose of being samples of the typewriter,

(Testimony of Roy L. Erickson.)

and they will not be exhibited to the jury unless it appears there is something else.

Mr. Gladstein: Very well. May I add one more objection that I had in mind, Your Honor, and that is that I think any sample taken from a typewriter whose seizure was not proper or legal would be improper to offer. That would go to these two.

The Court: You are making a motion——

Mr. Gladstein: To suppress.

The Court: All right, denied.

The Clerk: Plaintiff's Exhibit 29 introduced and filed into evidence as limited by the Court.

(Thereupon typewriting sample identified above [70] was received in evidence as Plaintiff's Exhibit 29, for the limited purpose stated.)

Mr. Schnacke: At this time I will offer the typewriter samples Mr. Erickson testified he took from the Royal typewriter found on the premises, as Government's exhibit next in order.

The Court: Subject to the same objection and admitted for the limited purpose already specified?

Mr. Schnacke: Yes, Your Honor.

The Clerk: Plaintiff's Exhibit 30 introduced and filed into evidence, as limited by the Court.

(Thereupon typewriting sample identified above was received in evidence and marked Plaintiff's Exhibit No. 30 for the limited purpose stated.)

Mr. Schnacke: Q. Mr. Erickson, I will show

(Testimony of Roy L. Erickson.)

you a three-page document and ask you if you have even seen that before, and if so, when and where?

A. Yes. I found this in a cardboard box that I previously testified was found on top of the dresser in the bedroom above the living room. That was a box which was unmarked. That is, I couldn't tell what the original purpose of the box was. On one end there were some numerals pressed in it or inked in reading "52-53".

Mr. Schnacke: I offer that document in evidence as Government's Exhibit next in order. [71]

Mr. Gladstein: Before we advise the Court. may we read it? It is a long three-page document.

The Court: Are you going to read this?

Mr. Schnacke: I propose to read parts of it, Your Honor. Might it be convenient to recess while counsel is referring to it? It might take some time.

Mr. Leonard: My suggestion is, if Mr. Schnacke has any other documents that would require some little time, we might see them now.

Mr. Schnacke: Yes, I have several.

Mr. Leonard: We have never seen these before.

The Court: Why don't you give them to counsel? We will have a recess a little bit earlier today and you can look at these documents.

Mr. Schnacke: Yes, I think that might be quite advisable.

The Court: We will take a recess a little bit

(Testimony of Roy L. Erickson.)

earlier this afternoon, ladies and gentlemen, so counsel can look at these documents.

(Short recess.)

Mr. Gladstein: May it please Your Honor, at the recess Mr. Schnacke handed us some eleven documents. They comprise approximately 50 pieces or more, in some instances of very closely typed material and in some instances of written material. It is obvious that Mr. Leonard and I have had no [72] opportunity to examine them. We would not be in a position to make our statement to the Court concerning them.

Mr. Schnacke: If Your Honor please, maybe I can shorten this. I will offer them for identification at this time and offer them in evidence tomorrow morning and counsel will have an opportunity over night to examine them.

The Court: That will be better.

Mr. Schnacke: So the document last referred to by the witness, Mr. Erickson, I will offer for identification, to bear the Government's next number.

Mr. Gladstein: Is that the three-page document?

The Clerk: That is correct, Mr. Gladstein.

(Thereupon the three-page document referred to was marked Plaintiff's Exhibit No. 31 for identification.)

Mr. Schnacke: Q. Mr. Erickson, I will show you a notebook and ask you if you have even seen that before and, if so, when and where?

A. Yes. I found this in one of the three boxes I previously testified were at the foot of the bed

(Testimony of Roy L. Erickson.)

in the bedroom above the living room side of the house. This particular box was apparently originally a box for soup—Rancho soup.

Mr. Schnacke: I will ask that the notebook described by the witness be marked Government's Exhibit 32 for identification. [73]

The Clerk: Plaintiff's Exhibit No. 32 marked for identification.

(Thereupon notebook referred to above was marked Plaintiff's Exhibit No. 32 for identification.)

Mr. Schnacke: Q. I show you a two-page document and ask you if you have ever seen that before, and, if so, when and where?

A. This was in one of the suitcases in the closet of the bedroom on the living room side of the house. The suitcase I have previously testified to as having some documents. It appeared to be a tanned suitcase, leatherette or similar material.

Mr. Schnacke: I will ask that the document described by the witness be marked Government's Exhibit next in order for identification.

(Thereupon two-page document referred to was thereupon marked Plaintiff's Exhibit No. 33 for identification.)

Mr. Schnacke: Q. I will show you what appears to be three identical mimeographed copies of a document—or four copies of the same document, and ask you if you have ever seen those before, and, if so, when and where?

A. All four of these were found in the expan-

(Testimony of Roy L. Erickson.)

sion briefcase I previously testified to as being on the bed in the bedroom [74] on the living room side of the house.

Mr. Schnacke: I will ask that all of those documents, all four of those documents, be offered as Government's Exhibit next in order for identification.

(Thereupon four copies of mimeographed document referred to above was marked Plaintiff's Exhibit No. 34 for identification.)

Mr. Schnacke: Q. I will show you a document consisting of several pages and ask you if you have ever seen that before, and, if so, when and where?

A. This document was found in its present state in the expansion briefcase that the last exhibit was found in.

Mr. Schnacke: I will ask that that document just described by the witness be marked Government's Exhibit next in order for identification.

(Thereupon several page document referred to above was marked Plaintiff's Exhibit No. 35 for identification.)

Mr. Schnacke: Q. I show you another document which appears to be torn in places and ask you if you have ever seen that before, and, if so, when and where?

A. This was also found in the expansion briefcase.

Q. The cellophane around it, I take it that was put there by you to preserve it?

A. I put it in there for that purpose, yes. [75]

(Testimony of Roy L. Erickson.)

Mr. Schnacke: You have no objection to the cellophane being on it?

Mr. Gladstein: No.

Mr. Schnacke: I will ask that that document be marked Government's Exhibit next in order for identification.

(Thereupon torn document described above was marked Plaintiff's Exhibit No. 36 for identification.)

Mr. Schnacke: Q. I show you a two-page document and ask you if you have even seen that before, and, if so, when and where?

A. This was also found in the expansion briefcase.

Q. The same expansion briefcase to which you have previously referred? A. Yes, sir.

Mr. Schnacke: I will ask that that document just described by the witness be marked Government's Exhibit next in order, for identification.

(Thereupon two-page document described above was marked Plaintiff's Exhibit No. 37 for identification.)

Mr. Schnacke: Q. I show you a four-page document and ask you if you have ever seen that document before, and, if so, when and where?

A. This was also in the expansion briefcase I have previously [76] testified to.

Q. I call your attention to the fact that there is a paper clip at the upper left-hand corner of that. Was that document clipped together in that fashion when you found it?

(Testimony of Roy L. Erickson.)

A. When we found it, yes; the original staple was probably removed for photostating.

Q. On any of these documents have you tampered with them in any way or changed them in any way?
A. No.

Q. Done anything to them other than examine them?
A. No.

Q. In some cases make copies of them?

A. No.

Mr. Schnacke: I will ask that that document identified by the witness be marked Government's Exhibit next in order for identification.

(Whereupon four-page document identified above was marked Plaintiff's Exhibit No. 38 for identification.)

Mr. Schnacke: Q. I show you a document consisting of several pages and ask you if you have ever seen that document before? And, if so, when and where?

A. This was also found in the expansion briefcase that was on the bed in the bedroom above the living room side of the house. [77]

Mr. Schnacke: I ask that that document just referred to be marked Government's Exhibit next in order for identification.

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 39 for identification.)

Mr. Schnacke: Q. I show you what appears to be two separate documents, each consisting of a number of pages stapled together, and ask if you

(Testimony of Roy L. Erickson.)

have ever seen that document before, and, if so, when and where?

A. This was also in the expansion briefcase, as the last exhibit.

Q. I call your attention to the fact that on that document, there is a staple on it. Was that the condition in which you found it?

A. The staples may have been removed for photostating, and then placed back.

Q. But if it is now stapled, it was stapled in that fashion when you found it?

A. Yes, sir.

Mr. Schnacke: I will ask that the document just described be marked as Government's Exhibit next in order for identification.

(Thereupon document described above was marked Plaintiff's Exhibit No. 40 for identification.) [78]

Mr. Schnacke: Q. I show you several miscellaneous sized documents and an envelope, and ask you if you have ever seen those before, and, if so, when and where, and under what circumstances the documents were arranged, or in what fashion they were arranged?

A. All of the papers clipped to the envelope were in the envelope, and the envelope with its contents was in the expansion briefcase on the bed in the bedroom above the living room side of the house.

Mr. Schnacke: I will ask that all of the documents and the envelope in which the documents

(Testimony of Roy L. Erickson.)

were found be marked as Government's Exhibit next in order for identification.

(Thereupon documents and envelope described above were marked Plaintiff's Exhibit No. 41 for identification.)

Mr. Gladstein: Your Honor, it would assist me in my examination of these documents this evening, if counsel would be good enough to state whether some or any or all of these, beginning with, I think, 31 for identification, fall in the category of what he said were documents concerning which he would or would not offer further evidence in connection.

The Court: Offer what?

Mr. Gladstein: Further evidence of connection with the defendants, or any of them.

Mr. Schnacke: Your Honor please, these documents are [79] being offered at this time, and I would prefer they be offered without any representation of further connecting up by reason of the fact that I think it is quite clear some of them will and some of them will not be connected up.

I prefer to have a ruling as to whether or not these documents found on these premises and under these circumstances are or are not admissible as they were so found. If that ruling is adverse to the Government, then I will be happy to make an offer such as suggested by counsel for the defendant as to which of the documents we will connect up and in what fashion.

The Court: Well, we better wait to meet that when you offer them.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Your Honor please, I have here an additional large number of documents which I will offer in groups, if I may, and will provide copies to the defendant in the same fashion as the others.

I offer them at this time solely for identification and will renew our offer—make our offer to introduce them into evidence tomorrow.

The Court: Mr. Schnacke, would it be possible for you to get all these documents marked, given an identification number by the Clerk after we adjourn today and furnish copies to the other side? Then you will have them all given a number already by the Clerk and cover them then one at a time, or [80] all in one group. It saves your walking back and forth each time you go to pick up a paper and go through the routine of doing that.

Mr. Schnacke: Very well.

The Court: That may save time.

Mr. Schnacke: All right.

The Court: I don't know whether that is in accordance with what you planned as to the method of presenting the matter. I just suggest that at this time. Maybe it isn't possible. However, there is a large number of papers, and if you had them all given a number by the Clerk tonight, then you can put the witness on to identify them all at one time, one right after the other, without any difficulty.

Mr. Schnacke: Yes, Your Honor. Will you indulge me for a moment?

Your Honor please, the only further matter I

(Testimony of Roy L. Erickson.)

have from this witness is the introduction of these documents. I will try to do it as expeditiously as possible, in the same fashion we have been doing.

The Court: If you want to do it that way,—

Mr. Schnacke: I think we can go through them rather rapidly.

The Court: All right.

Mr. Schnacke: Q. Mr. Erickson, I show you a group of papers and ask you if you have ever seen those before, and [81] under what circumstances?

The Court: This witness, I take it from what you said, is being used only for the purpose of identifying where the documents came from?

Mr. Schnacke: Yes, Your Honor.

The Court: And where they had been?

Mr. Schnacke: That is right.

The Witness: These are seven receipts found in the cardboard box I previously testified to as having been found in the closet at the head of the stairway on the second floor. That cardboard box was apparently originally a container for Burgermeister beer.

Mr. Schnacke: I will offer the documents which have been described as a group as Government's Exhibit next in order for identification.

(Thereupon documents referred to above were marked Plaintiff's Exhibit No. 42 for identification.)

Mr. Schnacke: Q. And I will ask the witness if the documents he is now examining have ever

(Testimony of Roy L. Erickson.)

before been seen by him and, if so, when and where?

A. These six slips of paper were also found in the box found in the closet at the head of the stairway on the second floor.

The Court: What are you doing with those, counsel? Do [82] you just have a clip on them?

Mr. Gladstein: I suggest they be put in an envelope.

The Court: Have you got any envelopes? Otherwise, my experience with some of these cases is that by the time the lawyers get through using these exhibits they get so mixed up we never can find them again. Put them in in some way so we won't get mixed up on them, now. The last one we had was No. 42.

The Clerk: No. 42 for identification, Your Honor.

Mr. Schnacke: And the group of documents last described I will ask be marked for identification as Government's Exhibit next.

(Thereupon group of papers referred to above were marked Plaintiff's Exhibit No. 43 for identification.)

Mr. Gladstein: One of these got lost already, Your Honor. Were there six or seven?

Mr. Schnacke: Seven.

Mr. Gladstein: I only find six.

(Further colloquy inaudible to the Reporter.)

Mr. Schnacke: Q. Did you identify that? The

(Testimony of Roy L. Erickson.)

document you are now looking at, Mr. Erickson, where did you find those?

A. These seven receipts were also found in the Burgermeister beer box in the closet at the head of the stairway. [83]

Mr. Schnacke: I will ask that the group of documents last identified be received and bear the Government's next in order.

(Thereupon seven receipts referred to were marked Plaintiff's Exhibit No. 44 for identification.)

Mr. Schnacke: Q. Now, I will show you a document consisting of one page, and ask you when and where you saw that, Mr. Erickson?

A. This was also in the Burgermeister beer box in the closet at the head of the stairway.

Mr. Schnacke: I will ask that that be marked with the Government's Exhibit next in order.

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 45 for identification.)

Mr. Schnacke: Q. I will show you another document and ask you if you have seen that document before?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 46 for identification?

(Thereupon document referred to was marked Plaintiff's Exhibit No. 46 for identification.)

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. And I will ask you the same question [84] with respect to that document (handing document to the witness)?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: I will ask that that document, consisting of three pages, be marked Government's Exhibit 47 for identification.

(Thereupon three-page document referred to was marked Plaintiff's Exhibit No. 47 for identification.)

Mr. Schnacke: Q. And I will ask you the same question with respect to that document?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked as Government's Exhibit 48 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 48 for identification.)

Mr. Schnacke: Q. And I will ask you the same question with respect to that document?

A. This was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 49 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 49 for identification.) [85]

Mr. Schnacke: Q. And I will ask the same question with respect to that document.

(Testimony of Roy L. Erickson.)

A. This, too, was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 50 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 50 for identification.)

Mr. Schnacke: Q. And the same question with respect to this document?

A. And this was also found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 51 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 51 for identification.)

Mr. Schnacke: Q. Same question as to that document?

A. This was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Plaintiff's Exhibit 52 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 52 for identification.) [86]

Mr. Schnacke: Q. Did you see that document in the cabin and, if so, where?

A. Yes. This was also in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Government's Exhibit 53 for identification?

(Testimony of Roy L. Erickson.)

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 53 for identification.)

Mr. Schnacke: Q. And the same question as to that document?

A. This, too, was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Exhibit 54 for identification?

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 54 for identification.)

Mr. Schnacke: Q. Same question with respect to that document?

A. This was found in the box in the closet at the head of the stairway.

Mr. Schnacke: May that be marked Exhibit 55 for identification? [87]

The Clerk: Plaintiff's Exhibit No. 55 marked for identification.

(Thereupon document referred to above was marked Plaintiff's Exhibit No. 55 for identification.) [87-A]

Mr. Schnacke: Q. When and where did you see that document?

A. This was found in the brief case which was on the dresser in the bedroom on the living room side of the house.

Q. I take it it was not in the cellophane bag; it was in the loose fashion, is that right?

A. That is right.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: May that be marked Government's Exhibit 56?

(Whereupon the document referred to was marked Government's Exhibit No. 56 for identification only.)

Mr. Schnacke: Q. I show you a manila folder containing a manila envelope and ask you if you saw that the the cabin?

A. This was in the expansion brief case which was on the bed of the bedroom above the living room side of the house.

Mr. Schnacke: I will ask that the large envelope referred to by the witness be marked Government's Exhibit 57 for identification.

(Whereupon the large envelope referred to above was marked Government's Exhibit No. 57 for identification only.)

Mr. Schnacke: Q. I will show you a book containing numbers in writing and ask the same question in respect to that.

A. This was found in the expansion brief case on the bed, in [88] the bedroom above the living room.

Mr. Schnacke: May that be marked Government's Exhibit 58 for identification?

(Whereupon book referred to above was marked Government's Exhibit No. 58 for identification only.)

Mr. Schnacke: Q. I will show you a single sheet of paper and I will ask you the same question with respect to that.

(Testimony of Roy L. Erickson.)

A. This, too, was found in the expansion brief case on the bed in the bedroom above the living room.

Mr. Schnacke: May that be marked Government's Exhibit 59?

(Whereupon sheet of paper referred to above was marked Government's Exhibit No. 59 for identification only.)

Mr. Schnacke: Q. The same question with respect to this paper?

A. This was found in the expansion brief case on the bed as previously stated.

Mr. Schnacke: May that be marked Government's Exhibit 60 for identification?

(Whereupon paper referred to above was marked Government's Exhibit No. 60 for identification only.)

Mr. Schnacke: Q. I will show you a notebook and ask you if you have seen that document before? [89]

A. This was found in the expansion brief case by the bed.

Mr. Schnacke: If Your Honor please, I discovered that the photostatic copies that I have of this notebook are incomplete. May I ask that the Government and the defendants have the opportunity to withdraw this notebook and to examine it or make copies from it if they so desire?

The Court: Very well.

Mr. Schnacke: I ask that the notebook be

(Testimony of Roy L. Erickson.)

marked Government's Exhibit 61 for identification.

(Whereupon notebook referred to above was marked Government's Exhibit No. 61 for identification only.)

Mr. Schnacke: Q. Will you identify that document?

A. This was found in the expansion brief case on the bed.

Mr. Schnacke: May that be marked 62 for identification?

(Whereupon document referred to above was marked Government's Exhibit No. 62 for identification only.)

Mr. Schnacke: Q. I will show you a folder containing certain papers and ask you if you can identify that.

A. The papers as they are now clipped were found in the folder they are now contained in and were found in the expansion brief case on the bed.

Mr. Schnacke: May that be marked Government's 63 for identification? [90]

(Whereupon papers and folder referred to above were marked Government's Exhibit No. 63 for identification only.)

Mr. Schnacke: Q. I show you a notebook and ask you if you can identify that?

A. This was found in the expansion brief case on the bed, in the bedroom above the living room.

Mr. Schnacke: May that be marked 64 for identification?

(Testimony of Roy L. Erickson.)

(Whereupon notebook referred to above was marked Government's Exhibit No. 64 for identification only.)

Mr. Schnacke: Q. I will show you a sheet of paper bearing typing and handwriting and ask you if you can identify that?

A. This was found in the expansion brief case on the bed.

Mr. Schnacke: May that be Government's 65 for identification?

(Whereupon sheet of paper referred to above was marked Government's Exhibit No. 65 for identification only.)

Mr. Schnacke: Q. Will you identify this sheet of paper?

A. This was found also in the expansion brief case on the bed.

Mr. Schnacke: May that be Government's 66 for identification? [91]

(Whereupon sheet of paper referred to above was marked Government's Exhibit No. 66 for identification only.)

Mr. Schnacke: Q. I will show you a group of several pages and ask you if you can identify those?

A. These were found clipped together in the brief case, the expansion brief case on the bed in the bedroom above the living room.

Q. They appear to be torn from a notebook. Did you tear them from a notebook. Did you tear

(Testimony of Roy L. Erickson.)

them from the notebook or were they in that condition when you found them?

A. No, they were in that condition.

Mr. Schnacke: I will ask that be marked 67 for identification.

(Whereupon pages from notebook referred to above were marked Government's Exhibit No. 67 for identification only.)

Mr. Schnacke: Q. I will show you several pages containing handwriting and ask you to identify that.

A. These were found clipped together in the expansion brief case that was on the bed.

(Whereupon pages referred to above were marked Government's Exhibit No. 68 for identification only.)

Mr. Schnacke: Q. I show you a small page and a large [92] page clipped together. Can you identify those?

A. These were found as they are now fastened in the expansion brief case that was on the bed.

Mr. Schnacke: May that be 69 for identification?

(Whereupon pages referred to above were marked Government's Exhibit No. 69 for identification only.)

Mr. Schnacke: Q. I will show you one page folded and ask you for your identification of that?

A. This was found in the expansion brief case that was on the bed.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: May that be marked 70 for identification?

(Whereupon folded page referred to above was marked Government's Exhibit No. 70 for identification only.)

Mr. Schnacke: Q. I show you several pages held together by a paper clip and ask you where you found those and in what condition you found them?

A. The four papers, or I should say the three papers, and one three by five card, were folded and in the envelope and all were contained in the expansion brief case which was found on the bed.

Mr. Schnacke: May that be marked 71 for identification?

(Whereupon the documents referred to were marked Government's Exhibit No. 71 for identification only.) [93]

Mr. Schnacke: Q. I show you an envelope and a sheet of paper and ask you if you can identify those and tell me of the circumstances in which they were found?

A. The paper was found folded in the envelope and the envelope was found in the expansion brief case that was found on the bed.

Mr. Schnacke: May the envelope and the paper together be marked Plaintiff's Exhibit 72 for identification?

(Whereupon envelope and paper referred to above were marked Government's Exhibit No. 72 for identification only.)

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. Will you identify that paper?

A. This was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be marked 73 for identification?

(Whereupon the paper referred to above was marked Government's Exhibit No. 73 for identification only.)

Mr. Schnacke: Q. I will show you an envelope and a sheet of paper and ask you where you first saw those and the circumstances under which you found those?

A. The paper was found folded in the envelope and the envelope was found in the expansion brief case which was on the bed.

Mr. Schnacke: May this be marked Government's 74 for [94] identification?

(Whereupon envelope and sheet of paper referred to above were marked Government's Exhibit No. 74 for identification only.)

Mr. Schnacke: Q. I will show you a manila envelope and a sheet of paper. Where did you see those?

A. The paper was found folded in the envelope and the envelope was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be marked 75 for identification?

(Testimony of Roy L. Erickson.)

(Whereupon manila envelope and sheet of paper referred to above were thereupon marked Government's Exhibit No. 75 for identification only.)

Mr. Schnacke: Q. I will show you a group of papers appearing to be two envelopes and papers attached thereto and ask where you saw those and the circumstances?

A. The two papers were found in the smaller envelope and the smaller envelope and the larger envelope all was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be marked Government's Exhibit 76 for identification?

(Whereupon the group of papers and envelopes referred to above were marked Government's Exhibit No. 76 for identification only.)

Mr. Schnacke: Q. I will show you what appear to be two envelopes and two pieces of paper clipped together. I ask you where you saw those and the circumstances of your identification?

A. The air mail envelopes and the two slips of paper were in the larger brown envelope and all was found in the expansion brief case which was on the bed.

Mr. Schnacke: May that be Government's 77 for identification?

(Whereupon the envelopes and paper referred to above were thereupon marked Government's Exhibit No. 77 for identification only.)

Mr. Schnacke: If your Honor please, I have no further questions of this witness. If any additional questions of this witness on direct examination are necessary to clarify any points that may arise after the offer of these documents in evidence, I would like to reserve the right to recall him.

At this time we are through with the direct examination of this witness.

Mr. Gladstein: If Your Honor please, we have just been handed some 200 or 250 pages of documents, some 30 or 40 exhibits. If I were to stay up all night long reading them, I doubt if I could possibly——

The Court: These documents have been identified.

Mr. Gladstein: That is true as to the documents since 31, [96] but it is not true as to others that have been received in evidence. I would like to suggest that this is precisely the kind of material that we requested by proper motion before the trial, and we are now placed in a position where we cannot examine these. They are going to be offered in evidence by counsel for the prosecution at some point through some witness, and we should have a familiarity with these documents in advance. I do not want to take the time of the Court and jury on this occasion.

The Court: All the witness has testified as to the other documents is as to where he found them.

Mr. Gladstein: That may well be. It is a matter of deferring when we have to read these and examine them.

The Court: Do you want to put this witness back on and cross examine him altogether at one time? Is that what you mean?

Mr. Gladstein: I do not think the difference between now and 4:00 o'clock——

The Court: Our adjournments are usually at 4:30. Is there some other matter you can take up? I think it is a little bit tiring to put in all these documents in one day, but after all, we would not like to keep the jury here indefinitely in days if we can clean up, take care of some other matters.

Mr. Schnacke: I would assume there would be some cross [97] examination as to matters as to which Mr. Gladstein has not claimed surprise. He certainly does not claim surprise as to all matters.

The Court: Can't you start your examination with respect to the other matters the witness has testified to except for these documents?

Mr. Gladstein: I would prefer not, if Your Honor please. I have been doing nothing but making a record here of the documents that have been handed to me, which I would like to examine, and that includes some of the documents that were received in evidence.

The Court: Are you going to have any more documents from this witness?

Mr. Schnacke: No, Your Honor. I have completed the examination of this witness. I can produce another witness if they want to waive cross examination of Mr. Erickson.

Mr. Gladstein: We will not waive any cross examination. If Your Honor requires it, we will com-

mence the cross examination now, but we would prefer to have an opportunity to examine the documents. I would think in the orderly process that would be desirable, instead of chopping up our cross examination of the witness at the point where counsel chose to leave off with all these documents in evidence.

The Court: He did that at the Court's suggestion to save time. [98]

Mr. Leonard: May I suggest that when I argued the motion for discovery, for a bill of particulars particularly, in which we saw precisely this information, Your Honor made some observation from the bench. I do not purport to quote you verbatim. But the general tenor of it was that if, as and when documents of this kind were introduced, the defense would be given plenty of opportunity to examine them and prepare for them.

The Court: I do not suggest that you would not have the opportunity to look at them. I wondered if you did not have some examination that you could go into to save time that does not refer to the documents. It is only recently that the examination has been confined to the documents.

I guess the jury is getting a little tired today sitting here anyhow. I see you nod your heads. We will take an adjournment until 10:00 o'clock tomorrow morning.

Please bear in mind the admonition of the Court.

(Whereupon this cause was adjourned to the hour of 10:00 o'clock a.m., Wednesday, April 14, 1954.) [99]

The Clerk: United States vs. Kremen, et al, further trial. Roy Erickson on the stand.

ROY L. ERICKSON

resumed the stand as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows:

Cross Examination

Mr. Gladstein: Shall I proceed, Your Honor?

Q. Mr. Erickson, you have told us that on the 27th of August from about 5 o'clock in the morning you and certain other agents of the Federal Bureau of Investigation took up a position from which you could keep the house there or cabin at the Twain Harte and its occupants under surveillance, that is right, isn't it?

A. That's right.

Q. I think you said that there were, how many other agents with you? A. Four.

Q. Five of you, including yourself?

A. Five altogether.

Q. Did you tell us who the other agents were?

A. No, I didn't.

Q. Would you do so?

A. Yes. There was Albert Clark.

Q. Yes?

A. Joseph McCann—that is spelled M-c C-a-n-n. James Carlisle—C-a-r-l-i-s-l-e. And Robert Hamilton—H-a-m-i-l-t-o-n.

Q. Now, the position that you and the other four agents whom you have just named took up

(Testimony of Roy L. Erickson.)

was on a hillside or in a hilly area from which you could look down, is that right?

A. That's right.

Q. And that is the spot you indicated generally in that first exhibit which represented your drawing of the place?

A. That is right.

Q. Were you joined between then and 1:04 in the afternoon by any other agents?

A. No.

Q. And were all of the other agents whom you named, were they continuously with you during that period of time?

A. Yes, sir.

Q. The arrest—I have mentioned 1:04 p.m. because I think I correctly repeat what you said, that was the time approximately of the arrest?

A. Approximately, yes.

Q. You did say 1:04, didn't you? [103]

A. 1:04, to my watch, when we got the orders.

Q. All right. Now, at the time that you took up your watch there that morning, of course you were acting pursuant to instructions of some superior, weren't you?

A. Yes, sir.

Q. And from where did you and these other members of the FBI come? What city?

A. From San Francisco, of course.

Q. Approximately when did you leave San Francisco?

Mr. Schnacke: I will object to that as not being material to any issues in this case.

The Court: It is pretty far afield, isn't it? What difference does it make?

Mr. Gladstein: (Inaudible to the Reporter.)

(Testimony of Roy L. Erickson.)

The Court: Unless it has some bearing on the credibility or something of that kind. I will overrule the objection.

The Witness: Actually, I think I left the city, it was, as I recall it, real early in the morning. I was instructed—I was conducting an investigation elsewhere, on the Peninsula, and was instructed to proceed on up to Twain Harte, being in a radio car.

Mr. Gladstein: Q. But my question was, approximately when did you and these other men you have named leave the city area to go to Twain Harte?

A. Well, I would say we left probably about 4:30. Between [104] 4 and 5 p.m. on the 26th day of August.

Q. That was the day before?

A. Yes, sir.

Q. I see. Now, were you told whom you were looking for or searching for or to arrest?

Mr. Schnacke: I object to that as being immaterial. I don't think the instructions that this agent had in any way bear upon his testimony on direct examination.

Mr. Gladstein: I will withdraw the question.

Mr. Schnacke: The question was, what he saw.

Mr. Gladstein: Q. Whom were you looking for?

A. We were looking for what we commonly have been calling "communist fugitives".

Q. Anyone by name?

A. No, not in particular.

(Testimony of Roy L. Erickson.)

Q. Now, you mentioned yesterday that during the course of your vigil there—. No, withdraw that.

You mentioned after the arrest you had some fingerprint cards of some kind, do you recall?

A. Yes.

Q. The fingerprint cards of what person or persons?

A. I had with me a complete set of the identification order cards, as I called them, on all of the so-called communist fugitives.

Q. Well, how many? Just give me a number.

A. Seven.

Q. You had seven cards? A. Yes.

Q. You had no card for Shirley Kremen, did you? A. No.

Q. You had no card for Patricia Blau, did you?

A. No, sir.

Q. You had no card for Carl Ross?

A. No, sir.

Q. And you had no card for Sam Coleman?

A. No, sir.

Q. I take it you had a card for Robert Thompson? A. Yes.

Q. Did you have a card for Sidney Steinberg?

A. Yes, sir.

Q. Did you take with you photographs of any kind?

A. Photographs appear on the card, yes.

Q. Then the very card that had the fingerprints also had photographs? A. Yes, sir.

Q. I take it you took all those with you when

(Testimony of Roy L. Erickson.)

you left in the late hours of the afternoon of August 26th? A. That's right.

Q. By the way, were you, Mr. Erickson, in charge of this group of agents whose names you have given us? [106]

A. Well, I don't think anyone was in charge. We were instructed to go there as a group, that is all.

Q. All right. It is true, then, that you had no photographs with you of those defendants whom I have named in my earlier question, that is, Shirley Kremen, Patricia Blau, Carl Ross and Sam Coleman? A. That's right.

Q. Now, you have testified that about 1 o'clock or 1:04 when you got instructions to make an arrest, an automobile or several automobiles were coming up toward the driveway of the house, is that right? A. That's right.

Q. And those cars contained agents of the FBI?

A. Yes, sir.

Q. And how many such cars were there?

A. There were five.

Q. How many agents altogether were there, excluding or including the five you have told us about?

A. Well, on my best recollection, reviewing the whole thing there were around 15 or 16 agents and one woman who came as a matron.

Q. Where did she come from?

A. She came from our San Francisco office.

(Testimony of Roy L. Erickson.)

Q. Did you put in a call for a matron to be sent?

Mr. Schnacke: Oh, I object to that as immaterial. What [107] relevancy does that have to anything this witness has testified?

The Court: Sustained.

Mr. Gladstein: Q. The matron, I take it, was brought so that a woman could conduct a search of Mrs. Kremen?

Mr. Schnacke: I object to that question as calling for an opinion and conclusion of the witness.

Mr. Gladstein: If he doesn't have any knowledge of it, he can say so, Your Honor.

The Court: Well——

Mr. Schnacke: (interposing) Why she was brought isn't material. She was there.

The Court: The objection is on the basis of the immateriality.

Mr. Gladstein: I am trying to establish the time, if Your Honor please, when it was determined to make an arrest of Mrs. Kremen, and I think that time can be elicited by establishing the time when an order was—when the fact was established that a matron was to be brought there.

Mr. Schnacke: I do not think the state of mind of the arresting officers or when they decided to make an arrest is material.

The Court: I am inclined to go along with you on that. Doesn't make any difference whether they have good, bad or indifferent motives. The only

(Testimony of Roy L. Erickson.)

thing that matters is what [108] happened. I will sustain the objection.

Mr. Gladstein: Q. Who was the matron?

A. Mrs. Elizabeth Kranke—K-r-a-n-k-e.

Q. I take it she is connected with the staff of the FBI here in San Francisco?

A. Yes, she is.

Q. When the automobiles came up to the premises, various agents immediately got out of the cars, did they not? A. Yes, sir.

Q. Did they or some of them draw firearms?

A. Yes, we all did.

Q. And directed them at the defendants?

A. "Directed"? I wouldn't call it "directed". We had them in our hands ready for any eventuality.

Q. And they were kept pointed, let's say,—or withdraw that. They were kept drawn, were they, for some time?

A. They were drawn until what we call submission to arrest, which was the time of handcuffing.

Q. There wasn't any effort on the part of anybody to avoid submission to arrest, was there?

A. No, sir.

Q. There wasn't any effort on the part of anyone to prevent the arrest of some other person there, was there? A. No, sir.

Q. And there was no effort on the part of anyone to escape [109] or seek flight of any kind, was there? A. No, sir.

(Testimony of Roy L. Erickson.)

Q. Now, you have told us that the senior agent, I thing you called him, or the officer in charge, or the agent in charge, addressed the people who were arrested and, among other things, said that they need not say anything, something of that sort, is that right? A. Yes, sir.

Q. And of course—withdraw that.

And I think you also said that the defendants did remain mute? That is so? A. Yes, sir.

Q. You testified yesterday that there came a time while you were watching the house when you became satisfied that one of the persons there was Robert Thompson, am I correctly quoting what you said?

A. No. We were satisfied that two of the people there were fugitives.

Q. When did you become satisfied of that?

A. Well, I—. It was after noon. It was possibly around 12 o'clock or shortly thereafter.

Q. And what was it that satisfied you?

A. Well, visible characteristics as we had been studying them.

Q. Is it fair to say that what satisfied you was that from [110] your observations through binoculars and your examination of the fingerprint cards and photographs that were on those cards, you reached the conclusion that two of the persons there sufficiently answered the description of the photographs on those two cards? Is that about right?

A. Well, that is approximately right. However,

(Testimony of Roy L. Erickson.)

one of the agents with us had seen them in person previously.

Q. Who was that?

A. Mr. Joseph McCann.

Q. Whom had he seen in person?

A. I believe he had seen both of them. I know he had seen Mr. Steinberg.

Q. He so advised you?

A. I knew it, yes, sure.

Q. When did you acquire that knowledge?

A. Oh, I probably knew that for years, couple of years.

Q. Did Mr. McCann accompany you—withdraw that.

If I understood your testimony correctly, Mr. Erickson, Mr. McCann accompanied you from San Francisco the prior day and was with you during the period of surveillance the following day?

A. I didn't say that, but he did, yes.

Q. It is true? A. Yes.

Q. How long, approximately after daybreak was it when [111] Steinberg first came out of the house and was visible to you?

A. We did not see him come out of the house or into the vicinity until just about noon.

Q. And did Mr. McCann say anything to you to the effect that he recognized Steinberg as the person who was coming out of the house?

A. Between that time and 12:30, yes.

Q. Had Mr. McCann, to your knowledge, been at the house prior to the 27th? A. No.

(Testimony of Roy L. Erickson.)

Mr. Schnacke: I object to the question as being immaterial. Well, I think the answer was given before I completed my objection. I withdraw the objection.

Mr. Gladstein: Q. The answer was that he doesn't know or that Mr. McCann was there?

A. To my knowledge, he was not.

Q. Do you have knowledge who, if anyone, of the agents was at the house the previous day?

Mr. Schnacke: I will object to the question as being outside the scope of the direct examination, and immaterial to the issues of the case, and not a matter as to which any of the testimony of this witness bears.

The Court: Sustained.

Mr. Gladstein: Q. Now, after the—. By the way, Mr. Erickson, in giving your testimony yesterday concerning these [112] documents that were identified by you, you testified that particular ones came from a briefcase, expansion briefcase, that others came from some other briefcase, was it?

A. Yes. A small zipper style case.

Q. Small zipper style case? Some came from that, some came from a suitcase, some came from one of several boxes, and so on? A. Yes.

Q. I take it you made a report or record of the sources from which each of these documents was taken?

A. Well, we made a notation as to where each came when I removed them from the box.

Q. Who made the notation? A. I did.

(Testimony of Roy L. Erickson.)

Q. All right. And I suppose it is true, isn't it, that after the lapse of so many months you resorted to an examination of those notes or some report to refresh your recollection, didn't you, before you took the stand?

A. No, I haven't referred to any notes, reports, or anything as such, no.

Q. Well, we have all observed that while you were testifying you made no reference to any report or to any notations, as such. But my question was, did you before taking the witness stand, for the purpose of refreshing your recollection, examine the contents of a report, reports, or record or notations? [113]

A. No, sir.

Q. So that all the testimony that you gave yesterday was solely and exclusively from a recollection of what took place on the 27th of August of last year?

A. Yes, plus the fact that, as I so testified, I removed those documents from the box they originally came in and turned them over to the United States Attorney, which was naturally of more recent date.

Q. Do any of these documents that you were asked to identify yesterday bear any notation or mark or contain anything that would indicate whether they were taken by you from a briefcase or from a box or from a suitcase or some other source?

A. They do, yes.

Q. What is the method?

A. Excuse me?

Q. What is the method?

(Testimony of Roy L. Erickson.)

A. As you will notice, on the original there is a letter near my initial and the date, on some of them. On others there is no letter. The letter or absence of the letter indicates to me the source from which the original came.

Q. Would you be good enough to explain that——

A. Sure.

Q. ——by reference to any of the exhibits that have been identified by you?

A. The Government's Exhibit 6 contains in the lower lefthand [114] corner my initials "RLE", and the date "8/27/53". And below that is the letter "L". That letter L indicates to me that it came from the search I conducted of the person of Mr. Ross. I did that for filing purposes, for organization purposes of the exhibits.

Q. You gave him the letter "L" at that time?

A. When I placed it—. At that time? No.

Q. Well, you didn't put your initials on that document at the time you took it off his person?

A. At the time I—yes, I did.

Q. Are they the same initials that the document now bears?

A. Yes.

Q. May I see the one that you have reference to?

A. Sure. My initials "RLE" and "8/27/53", they were placed on there——

Q. At that time?

A. At that time, yes.

Q. Then I take it from your testimony that the letter "L" which appears below the date and

(Testimony of Roy L. Erickson.)

your own initials was added at some later date, is that right? A. Yes, sir.

Q. When?

A. That was added when I had placed them, all the documents, in separate folders in a lettering system in accordance with the box or suitcase or briefcase from which they came. Then, [115] in order that I could find some way of remembering it, I placed the letter on there.

Q. Where was that done?

A. In the office of the United States Attorney.

Q. Well, then, is that true about all of the documents that bear either a letter or some other mark to indicate by a symbol that you understand the source from which you took them?

A. Yes, sir.

Q. When did this occur, this marking in the United States Attorney's office?

A. That occurred last week. I am quite sure it was the 5th or 6th of the month.

Q. At the time that you did this, in what kind of container were these various exhibits? Were they in that file such as we have seen Mr. Schnacke handling? A. That's right.

Q. Was there anything in the file or on the exhibit itself prior to your placing a letter or other symbol on it that would indicate the source from which it came, that is, whether a suitcase, box, briefcase, or what?

A. That was identifiable in two ways.

Q. What were they?

(Testimony of Roy L. Erickson.)

A. One, I prepared that folder which Mr. Schnacke has.

Q. Yes. [116]

A. Two, I in preparing folders, placed them in the folders and placed a letter on the folder so I would know. That letter, for example, on Government's Exhibit 6 was the same, the letter "L".

Q. Well, let's take that as an illustration of your testimony. As I understand you now, you have told us that the letter "L" that appears on the exhibit itself numbered 6—— A. Yes?

Q. ——had a corresponding letter upon the folder that you or the United States Attorney provided for its being contained in?

A. Yes, sir.

Q. That was one. And what was the other method you say you used?

A. The other method was, when I had these photostated I placed on the photostat, for the use of the United States Attorney in his following the matter, a small 3 by 5 slip of paper with a notation. That was stapled to the photostat only.

Q. That was on these notations?

A. The source from which it came.

Q. Was that by means of a letter or a statement?

A. It was just a small typed note, that is all.

Q. And that was as to each exhibit?

A. That is right. [117]

Q. And what happened to the small typed note?

A. That was placed only on the copies, as I

(Testimony of Roy L. Erickson.)

said, the photostatic copies used for study by the United States Attorney.

Q. Are you referring to the same kind of—to the photostats that counsel has used here?

A. Yes.

Q. But, Mr. Erickson, those don't bear any words, any statements, any assertions on them to indicate the source from which they come, do they?

A. No, but I placed it on there when I took them from the original source, that is, the box, the suitcase or briefcase.

Q. Are you now referring to the time you were actually in the house?

A. I am referring to the time when I removed them from the box, suitcase or briefcase.

Q. When did that occur?

A. Oh, that occurred at a different time for each exhibit since last August.

Q. Then is it correct to say that the documents that you took from the house or cabin up there at Twain Harte did not remain at all times precisely in the box or other type of container in which you originally found them? That is correct, isn't it?

A. No. That is correct only to this extent: they did not [118] remain there after I turned them over to the United States Attorney, nor were those in the box at the time I turned over the photographs or had the laboratory examine them.

Q. Let me ask you this: isn't it a fact that these documents that you have identified, you

(Testimony of Roy L. Erickson.)

simply picked up and took with you in bulk or in mass from the premises on the day of the arrest?

A. Yes, sir.

Q. And isn't it true that you and the other agents of the FBI, indeed, removed, in substance, everything that was on those premises except pieces of furniture or matters of that kind that appeared to be a portion of the house?

A. Everything was removed except that which the realtor handling the house identified as the property belonging to him.

Q. When did that occur? A. Pardon?

Q. When did it occur that he identified things that were not removed?

A. I didn't handle that. I don't know.

Q. But it was some time other than the day of the arrest, or at least after you left the premises after the arrest?

A. Probably the next day, something like that.

Q. Was anything removed from the premises—withdraw that.

Up to and including the time when you and the other [119] agents took all of the defendants away from the premises on the 27th, did you or they take with you any of the contents of the house, papers, documents, personal belongings, and so on?

A. I took all of the contents of the house of that type with me when I left, yes.

Q. Well, perhaps my question was ambiguous. I would like to put it differently.

I understood you to say that some time after you

(Testimony of Roy L. Erickson.)

left an effort was made to find out from the realtor what belonged to the house, and that you left that and that everything else was removed, is that right?

A. Yes, sir.

Q. But that occurred after the 27th of August, and I think you said probably the next day?

A. I don't know.

Q. Wasn't that what you said?

A. Yes, that is what I said.

Q. I don't want to pin you down to whether it was one day after or two days after. It doesn't make any difference. I just want to make it clear if it is true you had all gone and dispersed from there and taken the defendants into custody, and it was some time after that, upon verifying from the realtor what belonged to the rest of the house, you then took all the other things, that is right?

A. The other things, that is right.

Q. What things did you take?

A. I took with me all of the boxes, suitcases and briefcases containing the documents I have testified about. I took with me the material that the—those papers which were in the two automobiles. And I took with me the mimeograph machine, I think. And that is all.

Q. To your knowledge, did you leave any papers, documents or materials of the general nature of the exhibits that have been offered here, or did you take those all with you?

A. To my knowledge, I took them all.

Q. All right. Prior to taking them that date,

(Testimony of Roy L. Erickson.)

did you, in the presence of the defendants, or any of them, or after they had left, make any examination or search through the documents and papers?

A. Would you repeat that?

Mr. Gladstein: Yes. Would you read the question, Mr. Reporter?

(Question read by the Reporter.)

Mr. Schnacke: I suggest that question is ambiguous, Your Honor please.

The Court: It is a little complicated.

Mr. Schnacke: How could it have been done in the presence of the defendants after they had left?

Mr. Gladstein: It is the condition, if the witness [121] remained there after they had left for a time. But I will accept the criticism and change it.

Mr. Gladstein: Q. I am trying to find out, Mr. Erickson, if your first search through and examination of these various papers and documents that you took occurred after you had taken them all from the house and brought them to your office in San Francisco, or whether any search and examination occurred at the house?

A. The first search was made at the house.

Q. You made that? A. Yes, sir.

Q. Did you remove any of those documents or papers from their containers?

A. No, sir. Well, excuse me. If I removed them, I removed them to read them or glance at it and put it back in the package.

Q. I see. So that you brought them—it is your testimony you brought them with you to your office

(Testimony of Roy L. Erickson.)

in San Francisco for a more detailed study and examination and search? A. That is right.

Q. And at the time you brought them, you brought them in the very same containers in which you found them on the premises?

A. Yes, sir.

Q. All right. Now, did you swear out a warrant or complaint [122] against any of the defendants?

A. Did I personally?

Q. Yes. A. No.

Q. Did you cause one to be done?

A. No.

Q. Do you know whether one was done?

A. Complaints were filed, yes.

Q. Where?

A. I believe they were filed here in San Francisco.

Q. When? A. The night of August 27th.

Q. With whom?

A. To my own knowledge, I would say I don't know.

Q. It was with the United States Commissioner, wasn't it? A. I presume so, yes.

Q. That is Commissioner Karesh, isn't it?

A. Yes, sir. [123]

Q. Can you tell us from your own knowledge of what the defendants were charged with in that complaint?

Mr. Schnacke: It has already been testified that this witness was not present when the complaint was filed.

(Testimony of Roy L. Erickson.)

The Court: If you want the records, you can get them. You do not need to take time asking somebody else what the records show.

Mr. Gladstein: Q. Mr. Erickson, you told us that certain photographs that you took represented the appearance of the house from certain angles or places that you have indicated, photographs that you took that very day. A. Yes, sir.

Q. Did you take any photographs of the area immediately surrounding the house?

A. I believe the photographs that you are referring to show the area surrounding the house.

Q. Let me put it this way: Are the five—I think it was five that were offered, and if I am wrong about the number, whatever the correct number is—of the photograph that you identified here yesterday or the day before, all of the photographs that were taken of the premises?

Mr. Schnacke: I will object to that as being immaterial, if Your Honor please. I do not know what difference it makes whatever other photographs he may or he may not have taken. These are the only photographs that were taken and the only [124] photographs to which he testified. I suggest it is outside the scope of the direct examination and immaterial.

The Court: If there are other photographs, it may possibly be material. Overruled.

The Witness: I took additional photographs. I believe the rest are of the interior of the house.

Mr Gladstein: That is what I was leading to.

(Testimony of Roy L. Erickson.)

Mr. Gladstein: Q. You did take photographs of the interior? A. Yes, sir.

Q. Did you take photographs of the interior of the house before moving or touching or displacing any of the contents, particularly the documents, brief cases, and so forth? A. Yes.

Q. Did you take photographs of each of the rooms—in other words, the entire interior of the house?

A. I tried to get a shot, a so-called shot of each room, yes.

Q. Were those photographs developed?

A. Yes, sir.

Q. Did you turn them over to the United States Attorney or do you have them?

Mr. Schnacke: I have them. I have sent upstairs to get them. If you care to examine them and introduce them, you certainly may.

Mr. Gladstein: I will go to another thing. [125]

Mr. Gladstein: Q. Are those photographs Mr. Schnacke has just referred to, and which you took of the interior, were they taken before any of the exhibits, documents, contents of the house were touched or moved?

A. They were taken—yes. I would have to qualify that only to the extent that while I was taking those pictures, during that period there was the natural, normal amount of confusion. Some of the persons had been changing clothes and things like that; individual agents handling the individual search of the person, or recovering material for

(Testimony of Roy L. Erickson.)

that person, may have been moved. Other than that, no.

Q. Documents, brief cases, or the cartons——

A. They would still——

Q. I beg your pardon?

A. They would not have been moved.

Q. You testified that typewriters were sent to Washington, D.C. A. No, I did not.

Q. Sent somewhere to a laboratory?

A. No, I testified that specimens of the type were taken from the typewriters for transmittal to the laboratory.

Q. I misunderstood you. And they were sent to Washington? A. Yes, sir.

Q. Were these the same specimens that you referred to yesterday? [126]

Q. When they were returned were they accompanied with some report of any kind?

A. I do not remember whether a report accompanied them or came separately.

Q. The report did come?

A. I presume so. I wouldn't have personally handled it.

Q. You had no personal knowledge of any such report, the contents of it?

A. The contents. I probably wouldn't have personal knowledge of it.

Q. Did you yourself send the specimens?

A. I sent them, yes.

Q. Did you send some document of inquiry concerning them? A. Yes, sir.

(Testimony of Roy L. Erickson.)

Q. What was the inquiry?

Mr. Schnacke: I object to that as immaterial and as an unreasonable inquiry into the techniques of the Federal Bureau of Investigation.

Mr. Gladstein: I am not concerned with the techniques of the Federal Bureau of Investigation. I am simply concerned with cross examining on a subject that the witness himself was asked to give testimony on and which he did.

Mr. Schnacke: On the further ground that it is hearsay.

The Court: It is not within the reach of the cross examination, I do not think. The witness was only interrogated [127] as to whether he sent these documents on. That is all. I suppose the Government may follow it up. I do not know. They may follow it up with something else.

Mr. Gladstein: Do I understand Your Honor will not permit me to examine as to the——

The Court: Your question now is what inquiry the witness made as to what he wanted to find out about the writing. I will hold that that is not material cross examination.

Mr. Gladstein: Q. To get back a moment to photographs, not the ones I asked you about, did you observe that other agents besides yourself were taking photographs at and immediately after the time of the arrest?

A. No, I handled all the photography.

Q. Exhibits 2 and 3 are photographs. Did you take all of them, both of them? A. No, sir.

(Testimony of Roy L. Erickson.)

Q. Any of them?

A. Yes, I took the black and white.

Q. That is Exhibit 3? A. Yes, sir.

Q. Do you know when and where Exhibit 2 was taken?

A. Yes, sir, it was taken on Alcatraz Island on the day following the arrest, August 28th.

Q. That is No. 2? A. Both of them. [128]

Q. Maybe I am confused. There are three separate photographs on Exhibit 2. A. Yes, sir.

Q. Those are the ones to which you just referred in saying they were taken on Alcatraz?

A. Yes, sir.

Q. I understood you to say concerning the photograph on Exhibit 3, that you took that?

A. I did.

Q. When?

A. On Alcatraz, on August 28th.

Q. Then you made no photograph of the man whose photograph is seen in Exhibits 2 and 3 at the time of arrest?

A. I took the picture but it did not come out.

Q. You photographed each of the persons you found there? A. Yes.

Q. And fingerprinted each of the persons you found there?

A. I assisted in the fingerprinting.

Q. And the answer is as to all of them?

A. As to all of them.

Q. Exhibit 4, that is, photographs of the defend-

(Testimony of Roy L. Erickson.)

ant Steinberg, you took those at the cabin or at the house, didn't you? A. I did.

Q. No. 5 you may look at if you like and tell us where did you find that? [129]

A. As I testified on direct, I found that in the pockets of Carl Ross.

Q. Is there a mark on there that indicates that?

A. Yes, above my initial, the letter L.

Q. Does the letter L refer to things taken from the person of Ross? A. Yes, sir.

Q. What letter did you use for anything taken from the person of any other defendant?

A. I didn't take anything from the person of any other defendant.

Q. What other letters besides the L did you use in identifying these matters?

A. I used the letter M for one of the boxes at the foot of the bed, in the bedroom above the living room. I used the letter N for another, the letter Q for another. I used the letter O for the box that was on the dresser in the bedroom above the living room, the letter P for the box that was in the closet at the head of the stairway, the letter R for the zipper brief case on the dresser in the bedroom above the living room, the letter S for the suitcase in the closet in the bedroom above the living room, the letter T is for the suitcase that was on the bed in the bedroom above the living room, and I used no letter for the mass of material that was found in the expansion brief case on the bed in the bedroom [130] above the living room.

(Testimony of Roy L. Erickson.)

Q. No. 6 I think you said you found on the person of the defendant Ross? A. Yes.

Q. That is the list containing eggs and food-stuffs, is that so? A. Yes.

Q. Examine No. 7 if you will, Mr. Erickson. Where did you find that?

A. On the person of Mr. Ross.

Q. And No. 8? No. 8 you found in an automobile, didn't you? A. Yes, sir.

Q. I will ask you to look at the balance of these. Am I right in saying that commencing with the top exhibit, No. 9, that the remainder of those documents, and to the extent that they are documents—I think there are some photos as well—but the remainder of the documents there were taken not from the person of Ross or anyone else, is that right?

The Court: Is that up to No. 30?

Mr. Gladstein: All the remaining ones including those for identification. They go far beyond No. 30, Your Honor.

The Court: That goes to 77.

Mr. Gladstein: Perhaps this would be, if it suits Your Honor's convenience——

The Court: I made a record of it at the time. Do you [131] want to go through all of these again?

Mr. Gladstein: I only asked him a question.

The Court: He testified in the case of each one just where he found it, and my recollection is each one came from some box or suitcase or brief case,

(Testimony of Roy L. Erickson.)

and that he did not testify that any of them came from the person of Rasi. That was your question.

Mr. Gladstein: Or any of the other persons there. That was my question.

The Court: Or any of the other persons there.

The Witness: There were two or three documents I did take from the person of Mr. Ross.

The Court: Q. Included in this list?

A. Yes.

Q. Look through them.

A. Exhibit 7 is here. That was taken from his person.

Mr. Gladstein: I thought we commenced with No. 9, Mr. Erickson.

A. I have 7 here. I am sorry. The rest, the only way I can do is to check. I don't recall the identification number of the document, specifically where it came from, without looking at the document.

Mr. Schnacke: We will stipulate, Your Honor, after examining the record, that it is a fact that all exhibits from 8 on were taken from sources other than the person of someone [132] in the cabin.

Mr. Gladstein: That is satisfactory.

The Court: Q. Does that accord with your recollection pretty well?

A. To the best of my recollection, yes.

The Court: I made a note of that at the time the exhibits were entered. I could have made a mistake.

Mr. Schnacke: No. 8 was taken from the Chevrolet, 9 from the Ford, and so on.

(Testimony of Roy L. Erickson.)

Mr. Gladstein: One qualification I am sure Mr. Schnacke should agree to, and I think it would accord with the witness' recollection: There is an exception to the witness' testimony. For instance, I notice Exhibits 29 and 30, which represent his own typewritten specimens.

Mr. Schnacke: They were not taken from the person of anybody found at the cabin.

Mr. Gladstein: Q. Examine if you will No. 31 for identification, Mr. Erickson. Where did you find that?

A. 31? In a box on the dresser in the bedroom above the living room.

Q. Do you know to whom it belonged?

A. Do I know? No.

Q. Do you know to what use, if any, it was ever put?

Mr. Schnacke: I will object to that as calling for an opinion and conclusion of the witness. [133]

The Court: It does call for his opinion and conclusion. I think you could reframe that, however, and ask him if he knows of his own knowledge what was done with it, except what he did with it, something like that. I'm just trying to avoid——

Mr. Gladstein: I will adopt Your Honor's form of questioning.

Mr. Gladstein: Q. Mr. Erickson, except for what you did with the document after you took it, do you know what was ever done with it prior to that time?

A. No, sir.

Q. Or by whom it was known to or used by?

(Testimony of Roy L. Erickson.)

A. No, sir.

Q. Or when it came into existence?

A. No, sir.

Q. Or where? A. No, sir.

Q. Or when it first came to the house of Twain Harte? A. No, sir.

Q. Or by whom it was brought there?

A. No, sir.

Q. Or where it came there through the mail?

A. No, sir.

Q. Did you ever ascertain or do you know if the contents of this exhibit were ever known to my client, Mrs. Blau? [134] A. No, sir.

Q. Or Mrs. Kremen? A. No, sir.

Q. Or any of the other persons arrested there?

A. No, sir.

Q. If I asked you the same series of questions concerning each of the exhibits numbered from 32 on, including 77, would your answers be the same?

A. I would say yes.

Mr. Gladstein: Would Your Honor consent to a recess at this time, a morning recess? I think I have only a few questions of Mr. Erickson and I should like to check my notes. I may have concluded my examination, but I would like to consult with Mr. Leonard?

The Court: All right. I do not know whether I did tell the jury before, but we make a practice of taking a brief recess in the mid-morning and mid-afternoon. During those periods of your absence from the courtroom during recess, as well as when

(Testimony of Roy L. Erickson.)

you go home at night or come back in the morning or at noontime, you are still under the same admonition not to discuss the case among yourselves or let anybody else talk to you in any manner, shape or form or express an opinion until the matter is submitted to you.

We will take the usual mid-morning recess at this time.

(Recess.) [135]

Mr. Gladstein: Shall I proceed, Your Honor?

The Court: Yes.

Mr. Gladstein: Q. Mr. Erickson, I have been handed during the recess photographs that Mr. Schnacke brought down, and which I will ask you——

Mr. Gladstein: I suppose these should be marked for identification. I guess as a group would be satisfactory, Your Honor.

The Clerk: Defendant's exhibits, Mr. Gladstein?

Mr. Gladstein: Yes.

(Thereupon group of documents referred to above were marked Defendants' Exhibit A for identification.)

Mr. Gladstein: Q. I hand you a group of photographs that the Clerk has marked Defendants' Exhibit A for identification. Do you recognize those as photographs that you took and about which you have given testimony, any you took of the inside of the house at Twain Harte? A. Yes, sir.

Q. Are they all of the photographs that you took of the inside of the house?

(Testimony of Roy L. Erickson.)

A. I believe they are, yes.

Q. Now, the one on top——

Mr. Gladstein: I suppose these should be marked if I am going to ask questions separately about some of them. I [136] believe they should be given numbers 1, 2, 3, and so forth.

The Court: Suppose you have them marked in the order in which they are fastened together?

Mr. Gladstein: All right, I think I will ask the Clerk to mark them on the back or on the corner so there will be no confusion in the record.

The Clerk: The first photograph, Mr. Gladstein, is marked A, and the others are marked A-1 to A-14, inclusive.

Mr. Gladstein: Thank you very much.

(Thereupon group of photographs marked Defendants' Exhibit A for identification were individually marked Defendants' Exhibit A and Defendant's Exhibit A-1 through A-14 for identification.)

Mr. Gladstein: Q. The one on top is marked A, Mr. Erickson. What is that a photograph of?

A. That is a photograph of the living room on the first floor, taken from the dinette area.

Q. And at the time that you took it had anything, to your knowledge, been disturbed in the area that is shown in the photograph?

A. The only thing that may have been disturbed was, as I said, during changing into clothes, and so forth, by the defendants prior to departure. Otherwise, no.

(Testimony of Roy L. Erickson.)

Q. But in that picture itself, as you examine it, would you [137] say that that correctly represents substantially the appearance of that part of the house at the time the agents first entered it?

A. Yes, sir.

Mr. Gladstein: May I hold this up for the jury to look at, Your Honor?

The Court: Certainly.

Mr. Gladstein: Ladies and gentlemen, this is a photograph of a portion of the living room (displaying exhibit to the jury).

Mr. Gladstein: Q. Now, A-1. What does that represent, or what is it a photograph of?

A. That is a photograph of the living room area taken from the opposite corner as the previous one, or from the corner leading from the bath.

Q. Is that a picture of a portion of the same room? A. That's right.

Mr. Gladstein: Ladies and gentlemen, this is the portion of the living room that Mr. Erickson has just testified to (displaying exhibit to the jury).

Mr. Gladstein: Q. Now, the next photograph is marked A-2. What is that a photograph of?

A. That is a photograph of what on the chart would be marked the utility room, taken from the entrance itself. In other words, you open the door and that is what you see looking in. [138]

Mr. Gladstein: I now hold that up, ladies and gentlemen (displaying exhibit to the jury).

Mr. Gladstein: Q. Now would you look at Exhibit 3 and tell us what this is a photograph of?

(Testimony of Roy L. Erickson.)

A. A-3 is a photograph taken from the living room into the dinette area, showing the doorway on the extreme left, the dinette area with table, chair, and the box containing the mimeograph machine.

Q. And was that taken prior to and without anything in that area being disturbed by any of the agents?

A. That is right, other than what I have mentioned before, might have been disturbed.

Q. And I neglected to ask you if the prior photographs that you have already told us about, if it is true about them, also that nothing in the area was disturbed by the agents?

A. Yes, sir.

Mr. Gladstein: This, ladies and gentlemen, is the area that the witness has just identified (displaying exhibit to the jury).

Mr. Gladstein: Q. What did you say that represented Mr. Erickson?

A. It is a photograph of the dinette area of the house taken from the living room, showing on the extreme left the entry to the portion, the table in the dinette, with the box with the mimeograph machine. [139]

Q. That is the box that contained the mimeograph machine? A. Yes, sir.

Q. And over on the other side, those are phonograph records, are they not?

A. They were albums of phonograph records, yes, sir.

(Testimony of Roy L. Erickson.)

Q. And the next one, Exhibit A-4?

A. This was taken when I was about to leave. As I recall, I had another film left in the pack, and there had been that camping equipment and fishing equipment, and so forth, near the wall of the dinette nearest the kitchen, and we had just placed it in a bunch so it could be placed within the confines of the photograph.

Q. Then, in other words, the things shown in this photograph were placed there by the agents? That is to say, for instance, a bottle—well——

A. It is slightly out of focus, yes.

Q. Apart from being out of focus, there is a carton marked "Budweiser"? A. Yes.

Q. And then there is camping equipment and fishing equipment? A. Yes.

Q. And there seems to be a bottle of some kind, right? A. Yes.

Q. And another bottle that looks like a liqueur bottle? A. That is right. [140]

Q. Am I correct that these things in this photograph, A-4, were taken from various parts of the premises and put together so that they could be within the compass and focus of your remaining film?

A. After I had completed taking the pictures, just before I left, those were in and around the kitchen area and dinette area there, and they were placed right along the wall nearest the kitchen area and dinette, for the purpose of taking the photograph.

(Testimony of Roy L. Erickson.)

Q. Yes. So that, in other words, the photograph itself, A-4, does not show these items therein exactly as you found them, isn't that right?

A. That is right.

Mr. Gladstein: I will hold that up for the jury (displaying Exhibit to the jury).

Mr. Gladstein: Q. What is the next one? A-5.

A. That is a photograph, the best I could do, from the bed in the bedroom above the living room side of the house into the closet area which I mentioned existing, and which contained several suitcases, one of which contained some documents. And the one which contained the documents is the one on the extreme left. You can just see it in the corner.

Q. Were there any documents in the other suitcase shown there? A. No, sir. [141]

Q. Were there any documents in what appears to be a field pack type? A. No, sir.

Mr. Gladstein: Ladies and gentlemen—watch me, Mr. Erickson—as I understand the witness, it is this portion of the suitcase shown in the corner that contained some documents.

The Witness: Yes.

Mr. Gladstein: Q. This picture taken, does it show the area and contents of it exactly as you found it before any agents disturbed it?

A. Yes, sir.

Mr. Gladstein: (Showing exhibit to the jury.) You may ask for these later to examine them in

(Testimony of Roy L. Erickson.)

greater detail, if you like. I am sure his Honor will permit that.

Mr. Gladstein: Q. The next is Exhibit 6.

A. That is a photograph taken from about the same position as the other one, of the dresser which is in the bedroom above the living room side of the house, and containing that box which was unmarked, and the zipper briefcase.

Q. Did the zipper briefcase contain any documents? A. Yes.

Q. That is the one you have referred to?

A. Yes.

Q. Does that photograph as it is shown there represent a [142] portion of the area you have described of those premises and what is shown there without any disturbing of those items or moving of them generally by the agents?

A. That is right, yes.

(Exhibit A-6 displayed to the jury.)

Mr. Gladstein: Q. The next is Exhibit A-7. What does that show?

A. That is the best I could do of a picture from the doorway leading into the bedroom above the living room side of the house, and trying to show as much as I could of that bedroom. It shows the bed, some clothing there, and on the extreme right-hand corner you can see the dresser. On the bed you can see one suitcase and one expansion type briefcase.

Q. What did the suitcase contain?

A. The suitcase contained some documents.

(Testimony of Roy L. Erickson.)

Q. And the briefcase is also the one you referred to as containing some documents?

A. Yes, sir.

Q. Did you find all the items, that is, the suitcase and the expansion briefcase in that photograph, exactly as the photograph shows?

A. Yes, sir.

Q. Without any prior disturbance or moving of any of the items by anybody, is that right? [143]

A. That is right, yes. Other than—on all of these I would qualify that. Other than what someone might have moved in changing into new clothes, or something of that kind.

Mr. Gladstein: Very well. This, ladies and gentlemen, is the photograph Mr. Erickson has just identified now, (displaying exhibit to the jury).

Mr. Gladstein: Q. The next one?

A. That is a photograph from the bottom of the stairway looking up into the head of the stairway and the closet I mentioned existing on the second floor at the head of the stairway. It shows clothing in there is about all you can see.

Q. And that photograph was taken prior to any of the articles shown in this photograph being disturbed by anyone?

A. That is right.

(Exhibit A-8 was displayed to the jury.)

Mr. Gladstein: Q. What is the next, sir?

A. This is a photograph from the doorway—the doorway to the bedroom on the kitchenside of the house, trying to show the condition of that room as best I could.

(Testimony of Roy L. Erickson.)

Q. Now, those articles and items shown in that picture, were they so placed there in that position without any prior moving or disturbance by the agents? A. Yes.

Q. You are positive of that? [144]

A. Unless, as I previously said, there was some change there when people changed into other clothing.

Q. How long after the defendants were placed under arrest did you make these interior photographs?

A. I made them after they were photographed—after the defendants were photographed and fingerprinted and before they actually left the scene, in the cars.

Q. Did you make these photographs before or after various items of clothing were taken from the house to enable the defendants to wear them in the course of the drive back?

A. Some of them may have been taken before some of the defendants did change. Some of them were taken after they changed.

Q. And can you tell us specifically about A-9, whether you took that photograph on the second floor before or after the room had been used for the purpose of changing clothes?

A. Well, to the best of my recollection it would have been taken after they changed clothes.

Q. And so the position of the various items, including particularly the things that are strewn all over the bed, that doesn't represent the way the

(Testimony of Roy L. Erickson.)

room looked before things were moved around in it after the arrest, isn't that right?

A. Oh, no. Yes, it represents the way the room looked when we arrived, except for what may have been dropped there, what may have been picked up in the changing of clothes. In other words, the material that exists there, as it exists [145] in that photograph, existed there when we arrived.

Q. You mean in the room?

A. In the room, yes.

Q. But not necessarily in the positions they are shown here to be, that is, on the bed, and so on, isn't that right?

A. If they were moved, they could have been moved minorly in someone changing clothes, brushing aside of clothes.

Q. What did you find in this carton or box, if anything?

A. That was empty.

Mr. Gladstein: I will show you, ladies and gentlemen, this last photograph (displaying Exhibit to the jury).

Mr. Gladstein: Q. The next photograph is A-10. Can you tell us what that depicts, if you will?

A. This is a photograph of the closet from the bed in the bedroom above the kitchen side of the house.

Q. And it shows in an undisturbed state the things you found there in that area?

A. Yes.

Mr. Gladstein: I will hold that up (displaying exhibit to the jury).

Mr. Gladstein: Q. Next is A-11.

(Testimony of Roy L. Erickson.)

A. This is a photograph of the kitchen taken from what would probably be the dinette area of the house.

Q. It shows it in the same condition in which you found it, without disturbance? [146]

A. Yes.

(Exhibit A-11 was displayed to the jury.)

Mr. Gladstein: Q. Now, I come to A-12. What is that?

A. That is a photograph of a pair of pants that was found in the living room by another agent, and it was taken because money was found in the belt.

Q. You found money in the belt? Who found the money in the belt? A. Agent Dunker.

Q. And the picture was taken, then, the trousers and the belt and the money contained in it—in the belt, that is—were arranged by an agent for the purpose to show those things, isn't that right?

A. Yes.

Q. The photograph as taken doesn't really show the correct appearance of the trousers and the belt as you found them, does it? A. No.

Q. This is what you might call a staged picture, is it not?

A. It was placed there to show the pants and the belt on which the pants were contained and the fact that money was in the belt.

(Exhibit A-12 was displayed to the jury.)

Mr. Gladstein: Q. And the next picture, sir, is A-13.

A. And this is a photograph I took after remov-

(Testimony of Roy L. Erickson.)

ing the [147] mimeograph machine from the box that was previously shown, and the opening of the box containing the items used in supplying the mimeograph machine.

Q. You had to move the items shown here from other portions and bring them together in order to take this photograph, did you?

A. Yes. The mimeograph——

Q. What was your answer?

A. Yes. The mimeograph machine was in the box. I removed it to photograph it.

Q. And the paper, you had to bring that to this area on there and put these items in proximity to each other so that you could get them all into one film, isn't that right? A. Yes.

Q. Do you remember from where you obtained and brought the paper or the box containing the paper?

A. They were sitting just next to the box containing the mimeograph machine on the table.

Q. So, in other words, they were taken off the table and unwrapped and placed on the floor?

A. Yes, sir.

Q. That too, then, is a staged photograph, isn't that right? A. Yes, sir.

(Exhibit A-13 displayed to the jury.)

Mr. Gladstein: Q. A-14 is the last of the photographs, [148] and what does it portray?

A. This is a photograph of the desk in the living room, taken from the opposite side of the living room, showing generally the contents in there of the

(Testimony of Roy L. Erickson.)

desk, and I think you can see the typewriter down under the desk. That is about all.

Q. When you found that desk were the drawers like that, or did you or some other agent open the drawers so you could get a photograph that showed the contents as well as the desk?

A. The middle one was partly open. However, I pulled it out to show the contents.

Q. By the way, can you tell—you can tell us what the contents were? What were they?

A. Maps, phonograph records, some papers, documents, cards. That is about all.

Mr. Gladstein: I offer these in evidence, if Your Honor please.

The Court: Very well, they may be admitted.

(Thereupon photographs previously marked Defendants' Exhibits A through A-14 for identification were received in evidence.)

Mr. Gladstein: That is all.

The Court: They should have been admitted first, but that is all right.

Mr. Gladstein: I am sorry. [149]

Redirect Examination

Mr. Schnacke: Q. Mr. Erickson, the question was raised whether *the* fingerprinted and assisted in the fingerprinting of various of the persons found in the cabin. It is my recollection that you said you did, is that right? A. Yes, sir.

Q. I will show you four cards appearing to bear

(Testimony of Roy L. Erickson.)

fingerprints and ask you if you can identify those and tell us what you know about them?

A. Yes, Special Agent Howard Richardson and I together fingerprinted each of the defendants at the cabin. These are the prints we together took of Shirley Kremen, Carl Ross, Samuel Coleman and Robert Thompson.

Q. I notice that three of these cards are signed by Agent Richardson and one of them by yourself. I understand, nonetheless, you were present and cooperated in the taking of these prints, is that correct?

A. Yes, it was a small table we were working on. One had to hold the card while the other was rolling the prints.

Q. I will show you the first of the documents to which you refer and ask you if that document contains the true fingerprints of Shirley Kremen?

A. It does.

Q. Shirley Kremen is the young lady sitting at the defendants' table who has previously been described. [150]

Mr. Gladstein: Excuse me for interrupting. I would like to have leave to move to strike the prior answer and make an objection which may be deemed to have been made prior to the answer. I think the question called for his opinion and conclusion as formulated. I may be mistaken about that. If he says that he identifies that as something he saw taken from a defendant, that is one form of question; otherwise——

(Testimony of Roy L. Erickson.)

The Court: That is what he asked him.

Mr. Schnacke: I asked him if they represented the true fingerprints of the defendant Shirley Kremen.

The Court: Q. You saw her put her fingerprints on the card, is that it?

A. I rolled them on the card, yes.

Mr. Gladstein: That card. That is all I wanted to know.

Mr. Schnacke: I ask that that document be admitted into evidence as Government's next in order solely for the purpose of establishing the true fingerprints of that defendant, and without offering it as to any other matter on the card other than the name of the defendant and the fingerprints.

Mr. Gladstein: Your Honor, I think they are incompetent, irrelevant and immaterial at this point. I think they are objectionable.

The Court: It is a circumstance, it is a fact that we cannot evaluate until we have some other facts. They cannot put everything in all at one time. [151]

Mr. Gladstein: I understand that, but I should like to protect the record for Mrs. Kremen. I think it is not appropriate without some proper foundation being laid, and it is prejudicial. I object to it.

Mr. Schnacke: There has already been testimony that the prints were taken and these are the prints taken.

Mr. Gladstein: If that is so there is no occasion to offer the prints.

Mr. Schnacke: They may want to use them for

(Testimony of Roy L. Erickson.)

some other purpose. I do not know. I am not presenting the case. They may be admitted.

(The fingerprint cards referred to above were thereupon received in evidence and marked Government's Exhibit No. 78.)

Mr. Schnacke: Q. I will show you the second of the cards you previously identified. Will you tell me what that card represents?

A. These are the fingerprints taken, placed on the paper, of Carl Ross.

Mr. Schnacke: I will offer that in evidence as Government's Exhibit next in order for the same purpose.

Mr. Gladstein: May we have the same objection?

The Court: Admitted for the same purpose.

(Whereupon the fingerprint card referred to above was received in evidence and marked Government's Exhibit No. 79.) [152]

Mr. Schnacke: Q. I will show you the third of the cards you identified and ask you if you will describe what that card represents?

A. These are the fingerprints placed on the paper for Samuel Coleman.

Mr. Schnacke: For the same purpose I will offer that card in evidence as Government's Exhibit next in order.

Mr. Gladstein: Same objection.

The Court: Same ruling.

(Whereupon the fingerprint card referred to above was received in evidence and marked Government's Exhibit No. 80.)

(Testimony of Roy L. Erickson.)

Mr. Schnacke: Q. I will show you the fourth of the cards you identified and ask you if you will describe that?

A. These are the fingerprints from the fingers of Robert Thompson and placed on the card.

Q. That is the Robert Thompson whom you previously identified as being present at the cabin at the time of the arrest, is that it?

A. Yes, sir.

Mr. Schnacke: I will offer that in evidence as Government's next in evidence for the same limited purpose.

Mr. Gladstein: I will object to that on behalf of each and everyone of the defendants, severally and individually, and for the additional reason they are incompetent, irrelevant [153] and immaterial. They are not probative of any issue in the case.

The Court: It may be necessary to establish the identity of this man whose name is mentioned in the indictment.

Mr. Gladstein: I understand what the problems of the prosecution are under the law, but I think there is no foundation for a reception of this in evidence and I think it is prejudicial. It does not involve the defendants as such.

The Court: Overruled. It may be admitted.

(The fingerprint card referred to above was thereupon received in evidence and marked Government's Exhibit No. 81.)

Mr. Schnacke: Q. Mr. Erickson, I will call your attention to Defendants' Exhibit A-13, to which you

(Testimony of Roy L. Erickson.)

previously referred, that being the photograph of the mimeograph machine, and I will ask when you observed that mimeograph machine for the first time at the cabin if those cans of ink or either of them that are depicted there were open or sealed closed? That is, had the seal been broken on them? Were they new, unused cans or had they previously been opened?

A. They had previously been opened.

Q. And the mimeograph machine I understand was contained in a box when you first observed it?

A. Yes, sir.

Q. Was that box sealed tight? [154]

A. No.

Q. Had the mimeograph machine been inked prior to the time that you saw it, or was the machine entirely dry and shiny new?

Mr. Gladstein: If Your Honor please, that calls for a conclusion. He may state what he observed.

The Court: Yes. What was the condition?

The Witness: It appeared to have been a used machine.

Mr. Gladstein: I object to that.

The Court: Strike the answer out.

The Court: Q. What do you mean by that? Do you mean by that it was a new machine or what we speak of as a used machine, or what are you trying to tell us, that there was anything to show us it was freshly used? Is that what you are trying to get at?

Mr. Schnacke: I am trying to find out if the

(Testimony of Roy L. Erickson.)

inked cylinder, either interior or exterior, was wet and had been inked.

The Witness: It had been inked.

Mr. Schnacke: That is all.

Recross-Examination

Mr. Gladstein: Q. Mr. Erickson, you testified on redirect examination that you were present and observed the taking of fingerprints from four people, and you have named them.

A. I either observed it—I assisted in it and I took some of them. [155]

Q. There were five people taken into custody at that house and you have not named Sidney Steinberg as one of the persons whose fingerprints were taken, have you? A. No, I have not.

Q. Were they taken? A. Yes, sir.

Q. So that the five people who were there were fingerprinted? A. Yes, sir.

Q. Did you take any other fingerprints at or inside that cabin of any kind of any person, either from the person personally or from any other thing in the house at that time? A. I did not.

Q. Did you see anybody else do so at that time?

A. At that time, no.

Mr. Gladstein: That is all.

Mr. Schnacke: That is all.

Mr. Gladstein: I neglected to ask the usual rule excluding the witnesses. May I ask the Court to do that?

The Court: I do not know now. It is very dif-

ficult to do that. I do not know what witnesses have been here.

Mr. Gladstein: I appreciate that, and since it was I who was at fault, I am not going to raise any objection to anybody having been here.

The Court: Do you have any witnesses in the room now?

Mr. Schnacke: I do not know, Your Honor, whether there [156] are any here or not. We have not instructed them to stay out of the courtroom, and many of the witnesses have no place else to stay that provides any degree of interest for them. I do not think any showing has been made of any necessity for witnesses being excluded, and I respectfully oppose the motion. I think it is within the Court's jurisdiction whether to exclude them or not.

The Court: Are there any witnesses present?

Mr. Schnacke: (Turning to the audience in the courtroom) Is there anyone here subpoenaed as a witness in this matter?

There are some agents of the Federal Bureau of Investigation. I notice them in the back row. They are to be next called as witnesses, but other than they, I see no one else.

The Court: After this have the witnesses come into the witness room instead of into the courtroom. That applies equally in the case of the defense witnesses.

Mr. Schnacke: May we have one exception to that, Your Honor please? Mr. Erickson, who has worked so hard on this case, is essential at the counsel table with me.

Mr. Gladstein: No objection.

The Court: Call the next witness.

Mr. Foster: If Your Honor please, I think this is as good a time as any to start offering some of the documents that were marked for identification yesterday.

Mr. Gladstein: Your Honor, I would like to say that I [157] apprehend that these offers—I stayed up quite late reading some of these exhibits for identification. That is what Mr. Foster refers to. I have some authorities I would like to submit to the Court, and I apprehend the Court would not want counsel to argue law in front of the jury, and so I make the suggestion that we do it in the jury's absence.

The Court: I am not too overwhelmed by this problem. What is the point of offering these documents in evidence at this time? I am referring now to the long list of documents that were in various boxes that witnesses testified to. You have them identified. They are here now, and I could not admit them in evidence for exhibition to the jury, for the jury to see them, until there is some further relationship established.

Mr. Foster: If Your Honor please, perhaps Mr. Gladstein was right and we should argue that in the jury's absence.

Mr. Gladstein: I am satisfied with Your Honor's present ruling at this time. I do not want to argue, Your Honor, in view of that.

Mr. Foster: Very well. We will wait until a later time.

The Court: It is pretty early. I suppose you will have other data in the case. I assume so. They won't get lost. They have been marked for identification. They could be admitted for the limited purpose of establishing that they were documents that were obtained at a certain place and under certain circumstances, but that is just another way of marking [158] them for identification.

Mr. Schnacke: I respectfully suggest that they are properly admissible at this time, but I will follow Your Honor's advice and lay a further foundation for the documents.

The Court: The Judge always has an easier time when he has more of a record to rule on. We are asked to decide too many academic questions too soon.

Mr. Schnacke: Yes, Your Honor.

JOSEPH P. McCANN

called as a witness on behalf of the Government, and having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and jury?

A. Joseph P. McCann.

Direct Examination

Mr. Schnacke: Q. Mr. McCann, what is your occupation?

A. Special Agent of the F.B.I.

Q. Where is your duty station?

Mr. Gladstein: No objection.

The Court: Call the next witness.

Mr. Foster: If Your Honor please, I think this is as good a time as any to start offering some of the documents that were marked for identification yesterday.

Mr. Gladstein: Your Honor, I would like to say that I [157] apprehend that these offers—I stayed up quite late reading some of these exhibits for identification. That is what Mr. Foster refers to. I have some authorities I would like to submit to the Court, and I apprehend the Court would not want counsel to argue law in front of the jury, and so I make the suggestion that we do it in the jury's absence.

The Court: I am not too overwhelmed by this problem. What is the point of offering these documents in evidence at this time? I am referring now to the long list of documents that were in various boxes that witnesses testified to. You have them identified. They are here now, and I could not admit them in evidence for exhibition to the jury, for the jury to see them, until there is some further relationship established.

Mr. Foster: If Your Honor please, perhaps Mr. Gladstein was right and we should argue that in the jury's absence.

Mr. Gladstein: I am satisfied with Your Honor's present ruling at this time. I do not want to argue, Your Honor, in view of that.

Mr. Foster: Very well. We will wait until a later time.

The Court: It is pretty early. I suppose you will have other data in the case. I assume so. They won't get lost. They have been marked for identification. They could be admitted for the limited purpose of establishing that they were documents that were obtained at a certain place and under certain circumstances, but that is just another way of marking [158] them for identification.

Mr. Schnacke: I respectfully suggest that they are properly admissible at this time, but I will follow Your Honor's advice and lay a further foundation for the documents.

The Court: The Judge always has an easier time when he has more of a record to rule on. We are asked to decide too many academic questions too soon.

Mr. Schnacke: Yes, Your Honor.

JOSEPH P. McCANN

called as a witness on behalf of the Government, and having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Will you please state your name to the Court and jury?

A. Joseph P. McCann.

Direct Examination

Mr. Schnacke: Q. Mr. McCann, what is your occupation?

A. Special Agent of the F.B.I.

Q. Where is your duty station?

Mr. Gladstein: No objection.

The Court: Call the next witness.

Mr. Foster: If Your Honor please, I think this is as good a time as any to start offering some of the documents that were marked for identification yesterday.

Mr. Gladstein: Your Honor, I would like to say that I [157] apprehend that these offers—I stayed up quite late reading some of these exhibits for identification. That is what Mr. Foster refers to. I have some authorities I would like to submit to the Court, and I apprehend the Court would not want counsel to argue law in front of the jury, and so I make the suggestion that we do it in the jury's absence.

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Direct Examination

Mr. Schnacke: Q. Mr. McCann, what is your occupation?

A. Special Agent of the F.B.I.

Q. Where is your duty station?

(Testimony of Joseph P. McCann.)

A. New York City, New York.

Q. How long have you been assigned to that station? A. Approximately six years.

Q. How long have you been with the Federal Bureau of [159] Investigation?

A. As Special Agent 8 years.

Q. Do you know the defendant in this case, Sidney Steinberg? A. Yes I do.

Q. For how long have you known him?

A. Intermittently since November 1950.

Q. That was the first occasion on which you saw him? A. I believe that was.

Q. Since November 1950, approximately how many times have you seen the defendant Steinberg?

A. Prior to August 1953 about six or seven times.

Q. You see the defendant Steinberg in court here this morning, do you? A. Yes, sir.

Q. Sitting at the defense table?

A. Yes, sir.

Q. Will you compare to the best of your ability his present appearance with the appearance that he had at the time that you were first acquainted with him or first saw him?

Mr. Gladstein: I am going to object to that because of the form of the question, asking for a comparison.

The Court: I think the objection is good. The witness can state, of course, what the description of him was at one time and his description at another time.

(Testimony of Joseph P. McCann.)

Mr. Gladstein: That is what I have in mind, Your Honor. [160]

Mr. Schnacke: Q. Will you describe defendant Sidney Steinberg as he looked when you first saw him, to the best of your ability?

A. When I first saw him he was approximately 165 pounds, around that weight. He was heavy. He had a full face and a heavy build. His hair grew long. Of course, his hair was black. He was approximately five feet six inches in height, sallow complexion, light complexion.

Q. On the day of August 27th, 1953, did you see the defendant Steinberg? A. Yes, sir.

Q. Where did you see him?

A. In the vicinity of the cabin located at Twain Harte, California.

Q. At what time of that day did you first observe him?

A. I observed him at approximately 12:00 noon below the hill where I was stationed in the yard, parking area near the house.

Q. From the time you first observed him on that day until you spoke with him for the first time on that day, if you spoke with him on that day, will you tell us what you did?

A. I first saw him approximately 12:00 noon and also observed other people in that same area around that yard. I saw Mr. Thompson, Mr. Coleman and the others, and at approximately 12:30, when we on the hill were satisfied that two of the individuals

(Testimony of Joseph P. McCann.)

below were Mr. Thompson and Mr. Steinberg, on whom [161] there was process outstanding——

Mr. Gladstein: I'm going to object to that.

The Court: That last statement, "on whom there was process outstanding," may go out.

The Witness: Well, two individuals that were known to us as fugitives.

Mr. Gladstein: I am going to object to that, if Your Honor please. Also I would like to suggest that this is not responsive to the question. The question asked him to describe the appearance of a person.

Mr. Schnacke: I asked him what he did at the time he first saw them.

Mr. Gladstein: Excuse me. I have a motion to strike "known to us as fugitives."

The Court: That last part I do not think is objectionable.

Mr. Schnacke: Q. In any event, you saw the two persons whom you were able to identify at that time as Steinberg and Thompson?

A. That is right.

Q. When had you first in your career observed Thompson?

A. I observed him in New York City during 1950 and 1949, I believe, too.

Q. During those years approximately how many times had you seen him?

A. Numerous occasions. [162]

Q. Would you describe Mr. Steinberg's appear-

(Testimony of Joseph P. McCann.)

ance on the occasion that you saw him at the Twain Harte cabin?

A. He was, I would say, approximately 125 pounds to 130 pounds in weight. His hair was the same color as previously but was cut short. He was much thinner, both his face and his body, and he had grown a moustache.

Q. I will show you Plaintiff's Exhibit 4 and ask if that corresponds to your recollection of Mr. Steinberg's appearance when you saw him at the Twain Harte cabin? A. Yes, it does.

Mr. Schnacke: If Your Honor please, may this be passed by the jurors one to the other in order that they may compare this with the present appearance of the defendant Steinberg, who I will ask to stand for just a moment so the jury can see him?

The Court: I do not think you need to stand. Remain seated. The jury can see him from there. Do you wish to pass the photographs?

Mr. Schnacke: Yes, Your Honor.

(The photograph referred to was thereupon passed to the jury.)

Mr. Schnacke: Q. Mr. McCann, will you describe Robert Thompson's appearance during the years 1949 and 1950 when you were acquainted with him?

A. He was approximately, as I recall, five feet ten inches in [163] height, about 180 to 190 pounds, long brown hair, fairly stocky build. That is about it.

(Testimony of Joseph P. McCann.)

Q. Will you describe his appearance as you saw him on August 27th, 1953?

A. In August 1953 he was, I would estimate, much heavier than when I first saw him. Probably weighed about 210, possibly 220. This hair was red. It appeared to be dyed. It was cut short. He also had a light strawberry blond moustache. He was very stocky in appearance. He had a very large stomach.

Q. What color were his eyebrows?

A. I believe they were strawberry blond too.

Q. I will show you Government's Exhibit No. 2 and ask if that correctly reflects the appearance of Robert G. Thompson when you saw him on August 27th, 1953? A. Yes, sir, it does. [164]

Q. Does that resemble the Robert G. Thompson—withdraw that question.

Mr. Schnacke: I might show this to the jury in this fashion, Your Honor, rather than pass it around. (Displaying exhibit to the jury.)

The Court: Well, it is a little difficult for the jury to see. I meant to tell you that before.

Mr. Schnacke: The light is bad.

The Court: I think it would be better to pass it, thank you.

(Exhibit passed to the jury.)

Mr. Schnacke: Q. Did you have a conversation with the defendant Sidney Steinberg on the 27th of August? A. Yes, I did.

Q. And at the Twain Harte cabin?

Mr. Gladstein: Pardon me. I am going to ask

(Testimony of Joseph P. McCann.)

that the questions, in view of the answer, not be leading from now on.

The Court: I don't know. I never can tell what a lawyer is going to ask.

Mr. Gladstein: He has already asked it, Your Honor.

Mr. Schnacke: Are you objecting to a question I have asked?

The Court: Well, go ahead.

Mr. Schnacke: Q. Where did that conversation take place, Mr. McCann? [165]

A. In the yard outside the cabin at Twain Harte.

Q. And about what time of day was that?

A. It was approximately 1:05 p.m.

Q. That was at about the time of the arrest that was testified to by Mr. Erickson?

A. Yes, sir.

Q. What had you done immediately before that time?

A. Immediately before that time the other agents on the hill and myself had come down the hill and entered the yard of the cabin and met with the arresting party coming from the other direction.

Q. And as you came onto the cabin area proper, where did you go?

A. I went to Mr. Steinberg.

Q. At the time of this conversation to which you have referred, who else was in your immediate presence?

A. Agent Carlisle.

Q. Anyone else?

(Testimony of Joseph P. McCann.)

A. The special agent in charge was in the yard.

Q. What was the nature of the conversation you had with Mr. Steinberg? What did you say and what did he say?

A. I asked Mr. Steinberg who he was.

Mr. Gladstein: Excuse me. I am going to ask Your Honor to rule that any such conversation is admissible only concerning the defendant Steinberg. [166]

The Court: Have you established where the other defendants were? Well, I think we will follow that rule insofar as the conspiracy count is concerned, Mr. Schnacke, until a later stage in the proceedings. The testimony, when it obviously refers to one defendant, would only be admitted as to that one defendant.

Mr. Gladstein: That is what I had in mind.

Mr. Schnacke: We will make the appropriate application at a later time.

The Witness: A. I asked Mr. Steinberg who he was. He said, "You know who I am." And then I said, "Sidney Steinberg," and he said, "Yes."

I advised him that he was under arrest, as he had previously been advised, for violation of the Smith Act.

Mr. Gladstein: Just a moment, if Your Honor please. I ask the last part be stricken as to "he had previously been advised."

The Court: Maybe that is what he said. I don't know. You will have to develop that.

Mr. Gladstein: Well——

(Testimony of Joseph P. McCann.)

The Court: I can't tell from the answer.

Mr. Schnacke: The answer was that that was the text of the conversation.

The Court: Was that what you said to him?

The Witness: A. No, sir, I did not say "as previously [167] advised him." I merely said to him, "You are under arrest for violation of the Smith Act."

The Court: The other part of the answer may go out.

Mr. Gladstein: Thank you, Your Honor.

Mr. Schnacke: Q. What did you do in connection with defendant Steinberg at that time?

A. I ordered him to raise his hands and put them against a tree, and then I searched his person.

Q. How was he dressed at that time?

A. At that time he was dressed in blue denims and blue canvas shoes with crepe soles.

Q. What if anything did you discover on the search of his person?

A. I discovered merely some tissue paper in one of the pockets of his denims.

Q. Did you have a further conversation with him?

A. A short time after that I asked him if he had any personal possessions——

Mr. Gladstein: Just a second. The answer was "Yes," and then I want to ask that counsel establish the proper foundation.

The Court: All right.

Mr. Schnacke: Q. You say this was a short

(Testimony of Joseph P. McCann.)

time after the search. Now, were the same persons present and was the circumstances the same as it was at the time of the first conversation? [168]

A. Yes, sir.

Q. And what was that conversation?

A. I asked Mr. Steinberg if he had any personal possessions in the cabin. He said that he did. I asked him what possessions or possessions he had. He said that he had a wallet.

I asked him where the wallet was. He said it was in a dresser drawer in the cabin.

I brought Mr. Steinberg inside, and he pointed to a dresser drawer in the living room of the cabin and directed us to a wallet, a brown wallet, in that dresser drawer. We showed the wallet to Mr. Steinberg and he said that that was his wallet.

The Court: Mr. Schnacke, you have some more?

Mr. Schnacke: Yes, sir.

The Court: I think perhaps we might take the noon recess now. We will resume the trial, ladies and gentlemen, at 2:00 o'clock. Please return at that time.

(Whereupon the noon adjournment was taken to the hour of 2:00 o'clock p.m. this date.) [169]

JOSEPH P. McCANN

resumed the stand as a witness on behalf of the Government and having been previously duly sworn, testified further as follows:

Direct Examination—Resumed

Mr. Schnacke: Q: Mr. McCann, as I recall, prior to the noon recess, you had testified that you had a conversation with Mr. Steinberg about a wallet? A. Yes.

Q. And that you went with him into the house, and that he pointed out a wallet as his, is that correct? A. Yes, sir.

Q. Where did you say that wallet was located?

A. The wallet was located in a drawer in a dresser in the living room of the house on the first floor.

Q. I will show you a wallet which is now empty and ask you if you can identify that wallet?

A. This is the wallet in question.

Q. Are there any marks on that by which you can make that identification?

A. My initials are on this corner right here (indicating), and my recollection is that—there is a stamp “Mexico” on [170] the wallet, and I recall there was a stamp “Mexico” on this particular wallet.

Mr. Schnacke: May the wallet be marked for identification Government’s exhibit next in order?

(Thereupon the wallet referred to above was marked Plaintiff’s Exhibit No. 82 for identification.)

(Testimony of Joseph P. McCann.)

Mr. Schnacke: Q. I will show you a key and a number of documents and ask you if you have seen those before and, if so, when and where?

A. Those items were in the wallet which was found in the dresser drawer, and the key with it.

Q. And the key, also?

A. The key, yes, sir. The key was in the wallet.

Mr. Schnacke: I will ask that these documents and the key be received in evidence as Government's exhibit next in order.

Mr. Gladstein: If Your Honor please, my first point of objection is that the offer is too broad. It should be limited, in any event, if admissible, as against the particular defendant involved. The offer is simply that they may be received in evidence, so my first point is, if it is received at all, it can only be received concerning the defendant Steinberg.

My second objection is, however, even as to this defendant, [171] there is no proper foundation laid and it is incompetent, irrelevant and immaterial.

Mr. Schnacke: We will offer these as to the defendant Steinberg only at this time, and will make the appropriate motion with respect to them at a later time.

The Court: The exhibits will be admitted as against the defendant Steinberg.

(Thereupon key and documents referred to were received in evidence and marked Plaintiff's Exhibit 83, against defendant Steinberg only.)

The Court: Perhaps it might be well if I state

(Testimony of Joseph P. McCann.)

to the jury now that in connection with this witness' testimony we have previously admitted a conversation between the witness and the defendant Steinberg. And now some documents as against the defendant Steinberg have been admitted.

Now, the Court has admitted these documents and this testimony only as against the one defendant for the time being. Until such time, if at all, as the Court makes an order admitting this testimony as against all defendants, it is the duty of the jury to consider this evidence only as against the particular defendant against whom it has been admitted.

Mr. Schnacke: Q. Now, Mr. McCann, you have referred to a key as being found among the items that are included in [172] Government's Exhibit 83.

Did you have occasion to use that key on any of the items or containers or bags found around the Twain Harte cabin?

A. Yes, sir, I did.

Q. And did you find at that time that this key fitted the lock of any of those items?

A. Yes, sir, I did.

Q. What lock did it fit?

A. There was a brown suitcase which was in the upper bedroom of the house, I believe on the south side, with lock number 1120 on it. That key, which is also marked 1120, fits into that suitcase.

Q. And that bedroom is the bedroom that is over the kitchen-dinette area, is that right?

A. May I look at the diagram?

(Testimony of Joseph P. McCann.)

Q. Yes (handing exhibit to the witness).

A. Yes, I believe that is.

Q. Was that right, or was it in the other bedroom?

A. I believe it was in that bedroom, sir.

Mr. Schnacke: Your Honor please, I would like to identify these documents that have been admitted for the jury.

The key you have already heard referred to. There is another very small piece of paper that—well, it is quite short. I will read it.

“Wed—W-e-d—July 23,” and the figures “20”. “July 25” and the figure “20”. “Wages July 27” and the figure “25”.

There is something that is stricken that I can’t read. Another line follows, apparently two words that are illegible, followed by a “2” and “25”. Then, “John to R 30. Wages August 9-25. Rent August 9-9th.”

It bears on the back the date and certain initials.

Another small scrap of paper says, “September 16-860”. Under that “For car”. Then initials.

State of California Citizens Angling license in the name of Josh Newberg. Description. Issued October 18, 1952.

Then there is a small caption, “Approved identification card. Name: Joshua Newberg, 1224 Windemere Avenue, Menlo Park, California.” Telephone number. “Employed by: Music teacher”. And a description below that and the agent’s initials.

(Testimony of Joseph P. McCann.)

Then there are three cards, business card type. "Joshua Newberg, teacher of violin and mandolin, 1224 Windemere Avenue, Menlo Park. By appointment. Davenport 3-2604."

There is a Social Security card in the name of Joshua Newberg containing a signature after the word "Worker's signature". The signature appearing there reads "Joshua Newberg."

Then there are six documents, all appearing to be of the same character, that is to say, rent receipts received of [174] Joshua Newberg. The first, "\$80 for rent, 1224 Windemere, 1st of August, ending September 1st, 1952" bearing signature that appears to be "Leona Swan." That is dated August 3, 1952.

The next of them is generally the same, covering the period September to October 1st, dated September 1st. Also \$80. Signed "Leona Swan".

The next is dated October 1, 1952, covering October to November 1st, 1952, \$80, signed "Leona Swan".

And "April 1, 1952, received of Joshua Newberg \$80," same address, "April to May, 1952, Leona Swan.

"July 3rd, 1952, received of Joshua Newberg, \$80". Same address. "July to August 1st, Leona Swan."

"May 25 to June 1." Same address. "May to June 1." Leona Swan's signature.

June 1, 1952, rent receipt, "Received of Joshua

(Testimony of Joseph P. McCann.)

Newberg \$80 for 1224 Windemere, 1st June to 1st of July \$80," signed "Leona Swan."

Mr. Schnacke: Q. Mr. McCann, in your search of the person of Mr. Steinberg and in the wallet of Mr. Steinberg did you find any material on him bearing the name "Sidney Steinberg"?

A. No, I did not.

Q. Or anything bearing the name "Sidney Stein"? A. No, I did not. [175]

Mr. Schnacke: No further questions, Mr. McCann.

Cross Examination

Mr. Gladstein: Q. Mr. McCann, did I understand you to say you had seen Mr. Steinberg six or seven times before August, 1953?

A. Yes, sir.

Q. I think you said you first knew him or knew of him about November 1950?

A. I believe so, sir.

Q. Was this a personal acquaintance?

A. No, sir.

Q. You merely observed him at some time, is that it? A. Yes, sir.

Q. Was he pointed out to you as being Sidney Steinberg?

A. I had seen pictures of him.

Q. I beg your pardon?

A. I had seen pictures of him and——

Q. Prior to that time?

A. Pardon me?

Q. Prior to November 1950?

(Testimony of Joseph P. McCann.)

A. Yes, sir.

Q. Where? In what city? What part of the United States did you see Sidney Steinberg for the first time?

A. I believe it was New York City. It was New York City. [176]

Q. I beg your pardon?

A. New York City.

Q. No question about that, is there?

A. No, sir.

Q. That was in November, is that right?

A. I believe so, sir.

Q. Do you remember where in New York City you saw him? Just the general location.

A. Well, in the vicinity of his residence and in the vicinity of Communist Party headquarters.

Q. What is the address of the latter and what is the address of the former?

A. The address of his residence at that time was 31-23 83rd Street, Jackson Heights, Queens. That is his residence.

Q. Yes. And the other?

A. Communist Party headquarters was 35 East 12th Street.

Q. What city? A. New York City.

Q. Were you keeping him under surveillance at that time?

A. No, sir. In that particular month?

Q. Yes, in that particular time?

A. No, sir, not that particular month, no.

(Testimony of Joseph P. McCann.)

Q. But you did put him under your observation, is that right? A. Yes, sir. [177]

Q. I take it that wasn't an idle act of curiosity on your part, but part of your orders or instructions, is that so? A. Yes, sir.

Q. For how long on that first occasion did you keep him under your observation?

A. As best I can recall, and I feel quite sure the date was in November 1950, I observed him leaving his house one particular morning and proceeding to Communist Party headquarters via subway.

Q. You followed him?

A. That is correct.

Q. How long altogether did you have him under your observation or surveillance or examination at that time?

A. I believe it was approximately an hour.

Q. Was there, to your knowledge, any lawful process outstanding for his arrest or anything of that kind at the time?

Mr. Schnacke: I object to that as being immaterial. No process is necessary for such activity on the part of the FBI.

Mr. Gladstein: I am not suggesting that there is a question of whether there has to be lawful process.

The Court: It may be a matter of circumstances that goes into the matter of observation.

Mr. Schnacke: I don't see how whether there was process outstanding or not would affect the

(Testimony of Joseph P. McCann.)

ability recognize the [178] man after he sees him on this last occasion.

The Court: I would be inclined to agree with you, but nevertheless counsel can inquire into the circumstances. I will overrule the objection.

The Witness: There was no process.

Mr. Gladstein: Q. When was the next time you saw him? A. In June of 1951.

Q. Could you give us, to the best of your recollection, if you have one, the time in June?

A. I believe it was during the week running from June the 12th, approximately, to June the 17th.

Q. Well, are we to understand you saw him once during that interval or a number of times?

A. A number of times.

Q. How many times during that interval?

A. Oh, I would say approximately four times.

Q. Four? And in what city or cities?

A. New York City.

Q. Were these similar surveillances to the one that you have described?

A. The times that I saw him in June, I observed him on all occasions briefly, that is, when he was in the vicinity of his residence, and then on another occasion, perhaps, in the vicinity of Communist Party headquarters. I did not follow him for any length of time. [179]

Q. But you did follow him from one place to the other? A. No, I did not, sir.

Q. I see.

(Testimony of Joseph P. McCann.)

A. I merely observed him in both places.

Q. I see. You were assigned to do that?

A. Yes, sir.

Q. And you say the last such date would be before the 17th of June, 1951?

A. Yes, before June 17th.

Q. And there was no process of any kind outstanding against him during that period, was there?

A. There was no process outstanding.

Q. When is the next time you saw him, and in what city, after June 17th, 1951?

A. At Twain Harte, California, on August 27, 1953.

Q. And that's the time that you have already told us about?

A. Yes, sir.

Q. Mr. McCann, in your testimony this morning I understood you to say that at the time that you and the other agents left your place of observation at the house and went into the yard, that you found Mr. Steinberg there outside the house, is that so?

A. Yes, sir.

Q. And observed him alone or with anyone else?

A. Mr. Thompson was standing nearby. [180]

Q. With him? Oh, nearby?

A. Nearby.

Q. And were they the only two persons among the five who were taken into custody who were then outside the premises?

A. As best I can recall.

Q. Yes, sir. I understood you to say that you then had a conversation, a brief one, with Mr.

(Testimony of Joseph P. McCann.)

Steinberg in which you stated to him or asked him if he were Sidney Steinberg, and he said, "You know who I am," and so on, is that so?

A. Yes.

Q. And at that time you told him he was under arrest, is that so? A. Yes, sir.

Q. Were you the first officer that stated to him he was under arrest?

A. No, sir, I wasn't.

Q. Who was the first?

A. The special agent in charge advised the persons in the yard, namely, Thompson and Steinberg, prior to my telling Mr. Steinberg that.

Q. What did he say?

A. "You are under arrest. This is the FBI. You are under arrest."

Q. Then thereafter you, in your conversation with Mr. Steinberg, told him—you repeated the statement, in essence, [181] "You are under arrest"? A. Yes.

Q. And you told him what he was under arrest for, is that so? A. Yes.

Q. And you said, as I understand it, he was under arrest on a charge under the Smith Act?

A. Yes, sir.

Q. Now, was that the first statement to Mr. Steinberg made by you or anybody in your presence informing him of the ground or reason for his arrest?

A. I am not sure whether the announcement of the special agent in charge was prior to my or

(Testimony of Joseph P. McCann.)

subsequent to my statement, but he did also tell the defendants that they were under arrest,—that is, Steinberg and Thompson,—for violation of the Smith Act. I am not sure whether that was prior or subsequent to my advising him.

Q. You heard him say that either before or after you said the same thing?

A. That's right, yes, sir.

Q. I think you said that later on—withdraw that.

Immediately after that they were told to raise their hands, and so on, is that so?

A. Well, almost simultaneously.

Q. Yes. Guns were drawn by the agents of the Bureau? A. Yes, sir. [182]

Q. And I believe you said that they were directed to a tree or some trees nearby?

A. As far as Mr. Steinberg is concerned, we directed him to place his hands up against a tree.

Q. Up against a tree? Was he then handcuffed?

A. After we searched him, we then handcuffed him.

Q. Describe to us what the handcuffing consisted of?

A. Well, you reach out and grip his arm—

Q. No, just what did you do at that time, not what you would generally or usually do.

A. I don't understand the question.

Q. Did you handcuff him?

A. Yes, I handcuffed him, yes, sir.

(Testimony of Joseph P. McCann.)

Q. Did you put his arms around the tree and handcuff him? A. No, sir.

Q. Are you sure about that?

A. No, sir, I did not.

Q. Didn't you put his arms around the tree and handcuffed his hands, leaving him in a position where he had the tree between his body and his hands? A. I do not recall that, sir.

Q. Did you later come up to him and ask him if the handcuffs were too tight?

A. We did ask him if the handcuffs were too tight, yes, sir.

Q. And he said—what did he say? [183]

A. I recall that he said they were too tight.

Q. Is it true you then tightened them?

A. I loosened them.

Q. Are you positive of that?

A. I am positive of that, yes.

Q. How many times did you adjust the handcuffs?

A. As best I can recall, one time.

Q. Thereafter, I understood you to say that prior to taking Mr. Steinberg and the other defendants away from the premises, you or somebody in your presence asked him if there was anything he wanted to take with him and he made reference to a wallet, is that so? A. Yes, sir.

Q. And that you then took him into the house and this wallet that you have identified was the one he pointed out? A. Yes, sir.

(Testimony of Joseph P. McCann.)

Q. Your question to him was whether he wanted to take that with him, is that so? Before that?

A. My question outside was whether he had any thing in the cabin he wished to take with him.

Q. Yes. And your testimony is that he indicated that he had, and you took him in and he pointed out this wallet? A. That is right.

Q. Did you give him the wallet?

A. I showed him the wallet. [184]

Q. Did you give him the wallet?

A. I did not hand it to him.

Q. Did you give it to him?

A. I did not hand it to him.

Q. Did you give him any part of it?

A. No, sir.

Q. Did you give him anything in it?

A. No, sir.

Q. You didn't have intention of letting him have the wallet, did you?

Mr. Schnacke: I object to that as being immaterial.

The Court: Well, it is argumentative. Sustained on that ground.

Mr. Gladstein: Q. Did you take the wallet with you and then did you turn it over to somebody else? A. I examined the wallet.

Q. My question was, did you turn it over to somebody else—did you take it with you?

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. With you personally? A. Yes, sir.

(Testimony of Joseph P. McCann.)

Q. And took it back to San Francisco?

A. Yes, sir. [185]

Q. On the ride to San Francisco who were the occupants of the car in which you rode?

A. Special Agent James Carlisle drove the car. I rode in the back seat with Mr. Steinberg.

Q. Those are the three people? No others were in the car?

A. That is right, sir.

Q. Did you ask Mr. Steinberg during that ride if he cared to hear about his family?

A. Yes, sir.

Q. You knew he had a family, did you?

A. Yes, sir.

Q. What does his family consist of?

A. He has a wife, Sophie Steinberg and two boys.

Q. And their ages?

A. Oh, I believe they are approximately 17 and 13.

Q. What did you do with the wallet and the contents after you returned to San Francisco?

A. I still had it with me when I returned to the office, and Mr. Steinberg and I and the other agent went into an interview room, and I again looked at the contents of the wallet.

Q. Yes? And did what?

A. I then initialed the contents of the wallet and turned it over to one of the other agents to be detained in our files.

Q. Did you initial each item contained in the wallet? [186]

A. Yes, sir.

(Testimony of Joseph P. McCann.)

Q. What initials did you place on the wallet?

A. JPMc.

Q. Were your initials stamped on each document you have identified here?

A. Yes. I had a little trouble with the key. It was difficult.

Q. Was the key inside the wallet?

A. Yes.

Q. Aside from the key, you had no trouble writing your initials? A. No, sir.

Q. All right. What did you do then with the wallet and its contents?

A. I turned it over to one of the agents who put it in our files for safe keeping.

Q. That is the last you saw of it until today?

A. No, I have seen the wallet previously to today.

Q. Previously to today and since the time of the arrest? A. That is right.

Q. On how many occasions?

A. I believe on one occasion.

Q. Then was when, please?

A. In the United States Attorney's office.

Q. When? [187]

A. Oh, I believe it was yesterday.

Q. Did you appear before the Grand Jury?

Mr. Schnacke: I will object to that as being immaterial.

The Witness: Excuse me, sir?

Mr. Gladstein: There is an objection before the Court. Just a moment.

(Testimony of Joseph P. McCann.)

Mr. Schnacke: I don't see how his appearance before the Grand Jury——

The Court: What Grand Jury are you talking about?

Mr. Gladstein: The Grand Jury in this case, in regard to the wallet and its contents, if Your Honor please.

The Court: Well, that is—. I never heard of that being asked before.

Mr. Gladstein: I think it is permissible, Your Honor.

Mr. Schnacke: In any event, the proceedings before the Grand Jury are secret.

Mr. Gladstein: I didn't ask him what he said before the Grand Jury. I asked if he was there.

Mr. Schnacke: It isn't proper——

Mr. Gladstein: (interposing) There is no secret who is before the Grand Jury. The newspapers get it.

The Court: They are not supposed to know, but they get it anyhow.

Mr. Gladstein: I will ask for a ruling on the question, if Your Honor please. [188]

The Court: I will sustain the objection. I can't personally see the materiality of that.

Mr. Gladstein: Very well.

Mr. Gladstein: Q. Did you lodge a charge or sign a warrant or complaint against Mr. Steinberg?

Mr. Schnacke: I object to that, being outside the scope of the direct examination.

(Testimony of Joseph P. McCann.)

The Court: Read that, please.

(Question read by the Reporter.)

The Court: Sustained. Unless there is some question of credibility or personal feeling of some kind. It doesn't make any difference, anyhow. Let him answer it. Overruled.

The Witness: Yes, I did, sir.

Mr. Gladstein: Q. When and where?

A. On August 28th, 1953.

Q. Where?

A. At the United States Attorney's office.

Q. What charge did you levy against him?

A. I believe it was a harboring charge. We signed a complaint. I signed a complaint, as I recall, accusing Mr. Steinberg of being involved in the harboring of Mr. Thompson.

Q. You didn't charge him with violation of the Smith Act? A. No, sir.

Q. You didn't charge him with being a fugitive from the Smith Act? [189] A. No, sir.

The Court: Well, he couldn't do that anyhow. He wouldn't have any power or authority to do that, so don't waste time on that.

Mr. Gladstein: Q. Did you serve a warrant of arrest on Mr. Steinberg at any time?

A. No, sir.

Q. Did you have a warrant of arrest to serve on him? A. At one time I did, sir.

Q. When? A. On June 20, 1951.

Q. Did you have one on August 27, 1953?

A. No, sir, not in my possession.

(Testimony of Joseph P. McCann.)

Mr. Gladstein: Just a moment, Your Honor. Just one other question:

Mr. Gladstein: Q. I take it it is correct that you didn't actually ever serve a warrant of arrest on him? A. No, sir.

Q. When you say "No, sir," you mean that is correct? A. That is correct.

Mr. Gladstein: Thank you. That is all.

Mr. Schnacke: Just a moment, Mr. McCann. One or two more questions. [190]

Redirect Examination

Mr. Schnacke: Q. Are you assigned to some special squad or duty by the Federal Bureau of Investigation? A. Yes, sir, I am.

Q. And what is that squad?

A. In New York City?

Q. Well, are you on a particular detail or type of work?

Mr. Gladstein: Oh, I am going to object to that as incompetent, irrelevant and immaterial, if Your Honor please, and not proper redirect examination.

Mr. Schnacke: Well, the question has come up as to questioning the occasions on which he observed Mr. Steinberg. I wish to develop the circumstances under which that observation or observations were made.

Mr. Gladstein: But I object to the question about the nature of the detail. I suggest that it invites testimony that may be improper, harmful, and prejudicial error.

(Testimony of Joseph P. McCann.)

The Court: Well, at the time——

Mr. Schnacke: I will withdraw the question.

The Court: You can ask him at the time.

Mr. Schnacke: Yes, Your Honor. I will withdraw the question.

Mr. Schnacke: Q. Mr. McCann, you say you did have a warrant in your possession for the arrest of Mr. Steinberg on June 20, 1951?

A. Yes, sir. [191]

Q. Did you attempt to serve that warrant?

Mr. Gladstein: I am going to object to that as incompetent, irrelevant and immaterial and not proper redirect examination.

Mr. Schnacke: It is a subject that you brought up, Mr. Gladstein.

Mr. Gladstein: No, I asked him if he had a warrant.

The Court: I will overrule the objection.

The Witness: Will you read the question, please?

Mr. Schnacke: Q. Did you try to serve that warrant? A. Yes, sir.

Q. What did you do in your efforts to serve that warrant?

Mr. Gladstein: I will object to that as hearsay and improper redirect examination and not within the scope of the proper redirect examination.

The Court: Well, in a very technical sense it is probably not redirect. It is in the general scope of issues. I think the question itself is a little too broad, counsel. You can ask him whether he tried to serve it and whether he did serve it or not. I

(Testimony of Joseph P. McCann.)

think that would be as far as it would be proper to go.

Mr. Schnacke: Q. Did you try to serve that warrant?

A. Over what period of time did you try to serve that warrant?

Mr. Gladstein: May I have the same objection, if the Court please? [192]

The Court: For that limited extent I will allow it.

The Witness: A. I first attempted to serve it on June 20th, 1951, at Mr. Steinberg's residence, and he had not been seen since that time.

Mr. Gladstein: I will object to that last portion, if Your Honor please. He may state whether or not he served it on that occasion. To say whether he has or has not been seen is purely an opinion and conclusion of the witness.

The Court: That is a conclusion.

Mr. Gladstein: That is my point.

The Court: The witness may state what he saw.

Mr. Gladstein: Yes. I am not objecting to that.

Mr. Schnecke: Q. He was not seen by you after June 20th, 1951 until the time you saw him at the cabin at Twain Harte? A. Yes, sir.

The Court: Q. You were not able to serve the warrant after that time? A. No, sir.

Mr. Schnacke: That is all.

Recross Examination

Mr. Gladstein: Q. You tried to serve him on June 20th, 1951? A. Yes.

(Testimony of Joseph P. McCann.)

Q. In New York City? [193] A. Yes.

Q. Is that the last date you sought to effect service of the warrant on him?

A. That is the last day I went to his residence, yes, sir.

Q. You had the warrant with you at that time?

A. Yes, sir.

Q. Did you keep the warrant?

A. In my physical possession?

Q. Or under your control.

A. Yes, it was in the New York office, yes.

Q. Until when?

A. Until Mr. Steinberg was arrested out here, and then I believe the New York office sent it out here.

Q. You did not bring it with you?

A. No, sir.

Q. When did you come to California and San Francisco in connection with this arrest?

A. I arrived in San Francisco on August 25th, I believe.

Q. And it was in connection with this matter, was it?

Mr. Schnacke: I will object to that as being immaterial and beyond the scope of the redirect.

The Court: Sustained.

Mr. Gladstein: Q. Did you or didn't you bring with you the warrant for Mr. Steinberg's arrest?

A. No, sir. [194]

Mr. Gladstein: Will Your Honor indulge me if I frame one more question in that connection?

(Testimony of Joseph P. McCann.)

Mr. Gladstein: Q. Is it or not true that your coming to California on or about the 25th of August 1953 had to do with the matter of arresting Sidney Steinberg?

Mr. Schnacke: I object to that as being immaterial and beyond the scope of the redirect examination.

The Court: What difference does it make anyhow? It is obvious he must have come out here for something in connection with it.

Mr. Gladstein: Yes, that is right, but I would like to have him state if that is the fact.

The Court: I guess they were trying to find him. That is what the witness indicates. What difference does it make what day he came?

Mr. Gladstein: Does Your Honor wish to have me answer that?

The Court: No, perhaps I should not have said it. I do not see any point in prolonging the examination. It is not material to the direct examination.

Mr. Gladstein: According to my theory of the defense it is material and I will simply take a ruling.

(The question was read.)

The Court: Sustained.

Mr. Gladstein: That is all. [195]

Mr. Schnacke: One more question.

Further Redirect Examination

Mr. Schnacke: Q. The warrant that you at-

(Testimony of Joseph P. McCann.)

tempted to serve on June 20th, 1951, do you know from what Court or authority that was issued?

Mr. Gladstein: I object to that because it is not the best evidence. It calls for the opinion and conclusion of the witness.

The Court: The trouble is you opened this subject about the warrant yourself. Of course it is not the best evidence. There is no doubt about it. It is a waste of time. When you have matters of record you should not be asking people to tell you what they think about papers.

Mr. Gladstein: If Your Honor will indulge me, and I think the record will support me, this is how the matter came up: I asked the witness if he had a warrant for the arrest of Mr. Steinberg on the 27th and he said no, but he had one previously from New York. In other words, it was a volunteer statement on his part.

The Court: No, you asked him whether at the time he went to see him he had a warrant and whether he kept it with him, and he said no, he had it in the office. You developed that line of examination, too.

Mr. Gladstein: That came without—— [196]

The Court: Let us pass over it and get on to something else.

Mr. Gladstein: I simply made an objection.

Mr. Schnacke: Was the objection sustained, Your Honor?

The Court: That was your objection.

Mr. Schnacke: No, my last question was for the

(Testimony of Joseph P. McCann.)

authority issuing the warrant that he had in his possession in New York.

The Court: Well, you know what it is, counsel.

Mr. Schnacke: The point is there has been a discrepancy by one day I would like to clarify.

The Court: Overruled.

The Witness: A. The warrant that I served——

Mr. Schnacke: (Interposing) That you attempted to serve on June 20th, 1951, in New York.

The Witness: That was a commissioner's warrant issued from the office of the United States Commissioner.

Mr. Schnacke: Thank you.

The Witness: The Southern District of New York.

Mr. Schnacke: No further questions.

The Court: Anything else? That is all.

(Witness excused.)

JAMES F. EAGAN

called as a witness on behalf of the Government, and having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [197]

The Clerk: Q. Please state your name to the Court and to the jury. A. James F. Eagan.

Direct Examination

Mr. Schnacke: Q. Mr. Eagan, what is your occupation?

A. Deputy United States Marshal.

(Testimony of James F. Eagan.)

Q. In the course of your employment as Deputy United States Marshal have you ever met or seen the defendant Sidney Steinberg?

A. I have.

Q. Will you describe the circumstances under which you saw him and the approximate date, if you recall?

A. Well, I don't remember the exact date but it was at the time they were in custody in our office.

Q. At the time Mr. Steinberg was in your office did you have occasion to take his fingerprints?

A. I did.

Q. I will ask you to look at that document and identify it if you will, please?

A. I am sorry, I didn't hear you.

Q. I said will you identify that document if you can.

A. That is the fingerprints I took of Sidney Steinberg on August 31st, 1953.

Q. And that is a business record of the office of United States Marshal, is it? [198]

A. That is right.

Mr. Schnacke: I will ask that that document be received in evidence.

The Court: Admitted as to the defendant Steinberg.

(The document referred to was thereupon received in evidence and marked Government's Exhibit No. 84.)

Mr. Schnacke: No further questions.

Mr. Gladstein: No questions, Your Honor.

(Testimony of James F. Eagan.)

Your Honor stands that this last exhibit, similar to the previous one, is subject to a general objection that they have no probative value unless there is some further purpose.

The Court: Overruled.

(Witness excused.)

WILLIAM L. HANNAN

called as a witness on behalf of the Government and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. William L. Hannan.

Direct Examination

Mr. Schnacke: Q. Mr. Hannan, what is your occupation? [199]

A. Deputy U. S. Marshal.

Q. Assigned to what office?

A. The Marshal's office, Criminal Department.

Q. In San Francisco? A. Yes.

Q. In connection with your duties on about September 9th, 1953, did you see any of the defendants in this case? A. Yes, sir, I did.

Q. Which of the defendants did you see?

A. I saw all three of them.

Q. Which three? I will withdraw that.

Among the three did you see the defendant Patricia Blau? A. Yes.

(Testimony of William L. Hannan.)

Q. Who is sitting at the end of the table?

A. Yes.

Q. On that occasion did you have occasion to take her fingerprints? A. Yes.

Q. I will show you a document and ask you if that document represents the fingerprints that you took of Patricia Blau on that occasion?

A. Yes.

Q. On that occasion did you ask the defendant her name? A. Yes.

Q. What name did she give you? [200]

A. Janet Marie Conroy.

Mr. Schnacke: I will ask that the document identified by the witness be received in evidence as Government's next in order.

Mr. Gladstein: Same objection and the same request for limitation, if the Court please.

The Court: Same ruling. Admitted.

(The document referred to above was thereupon received in evidence and marked Government's Exhibit No. 85.)

Mr. Schnacke: No further questions.

Cross Examination

Mr. Gladstein: Q. Is this your writing on this document at the top? A. Yes.

Q. I see you have written there Janet Marie Conroy? A. Yes.

Q. You have also written "alias Patricia Blau?"

A. Yes.

(Testimony of William L. Hannan.)

Q. You asked her if that had been her name at one time?

A. Well, she was under that—yes.

Q. She said that had been her name?

A. Yes.

Mr. Gladstein: That is all. [201]

Mr. Schnacke: If Your Honor please, may the order excluding witnesses be held not to apply to members of the United States Marshal's office whose duties will call them in and out of the courtroom?

The Court: All right.

(Witness excused.)

GLENN A. HARTER

called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and jury.

A. Glenn A. Harter.

Direct Examination

Mr. Schnacke: Q. Mr. Harter, what is your occupation?

A. I am a special agent with the F.B.I.

Q. For how long have you been so employed?

A. 11 years.

Q. To what office are you assigned?

A. San Francisco.

(Testimony of Glenn A. Harter.)

Q. On August 27th of last year were you one of the agents at the Twain Harte cabin?

A. Yes, sir. [202]

Q. Did you participate in the arrest of any of these defendants? A. Yes, I was present.

Q. You were present at the time they were arrested. What time did you first arrive at the cabin, Mr. Harter?

A. About five minutes after 1:00.

Q. After you arrived can you tell us in general what you did in connection with these defendants? What was your assignment at the cabin, in other words?

Mr. Gladstein: I am going to object to what his assignment was.

Mr. Schnacke: Q. Pursuant to your assignment what did you do at the cabin?

A. I stood outside with the other agents and the defendants, and then I went into the cabin and stood there. At the same time the matron was with the female defendant and then I went back outside——

Q. There are two female defendants. Which of them are you referring to?

A. Mrs. Kremen. When I got outside I looked in her handbag and her overnight case that she brought with her in the company of the matron.

Q. Where was that, Mr. Harter?

A. Just outside the cabin door.

Q. In the area outside the cabin? [203]

A. Yes.

(Testimony of Glenn A. Harter.)

Q. Approximately what time of day was that, do you recall? How long after the arrest was made did that occur?

A. I don't recall exactly. I would say maybe 20 minutes, 30 minutes.

Q. Did I understand you to say that Mrs. Kremen had been in the cabin and had changed her clothes and was coming out of the cabin at this time? A. That is correct.

Mr. Gladstein: I didn't get all of that. Maybe he did but I didn't hear it. I object to leading questions.

The Court: Perhaps it was, but the witness already answered it.

Mr. Schnacke: Q. Did you have a conversation with Mrs. Kremen on that occasion?

A. No, sir, I didn't converse with her at that time.

Q. Did you say anything to her?

A. No, sir.

Q. And she said nothing to you? A. No.

Q. You say she did have with her her purse, is that right? A. That is correct.

Q. Did you take that purse from her?

A. No, she set it down on the ground there, and I then examined it. [204]

Q. What did you do with respect to the contents of that purse?

A. I put my initials and the date on each piece of paper that was in her purse that I thought would be pertinent.

(Testimony of Glenn A. Harter.)

Q. Then what did you do with her purse?

A. Then I turned it over to Mr. Erickson.

Q. I will show you certain documents and ask you if you have ever seen those before, and if so when and where?

A. Yes, these are the documents that were in the purse of Mrs. Kremen.

Mr. Schnacke: I will ask that those documents as a group be received in evidence as Government's Exhibit next in order, and we will offer them at this time solely against the defendant Shirley Kremen.

Mr. Gladstein: I make the objection that there was no warrant of arrest or search warrant at the time and under the circumstances no proper foundation has been laid for the reception of these documents in evidence, and I move to suppress them, the same motion I made about previous documents.

The Court: I have already ruled on the objection, so the motion will be overruled.

(The documents referred to were thereupon received in evidence and marked Government's Exhibit No. 86 as to the defendant Kremen.)

Mr. Schnacke: May I identify these to the jury, if Your [205] Honor please? There is a library card, the San Jose Public Library, in the name Lee Kaplan, Mrs. R. K. in parenthesis, 1244 Lick Avenue, expires September 16th, 1955.

Another library card, San Jose Public Library, expires June 18th, 1955, Richard Kaplan, 1244 Lick Avenue.

A State of California resident citizen's angling

(Testimony of Glenn A. Harter.)

license in the name of Lee Kaplan, 1244 Lick Avenue, San Jose.

United States Forest Service, free campfire permit issued to Mrs. Lee Kaplan, 1244 Lick Avenue, San Jose, date of issue July 13th, 1953. The signature of the issuing officer is shown as James Morrow, Agent, issued at Twain Harte, and an automobile as described. The make, Plymouth; license number 1A38276, the State, California.

Social Security card in the name of Lee Kaplan, an identification card, automobile insurance, bearing the rubber stamp GARVIS, insurance agent, Oakland, California. The typewritten name, Richard Kaplan, San Jose, California. Policy number, and it expires September 18th, 1953.

California Motor Vehicle Operator's License in the name of Lee Lefko Kaplan, 1244 Lick Avenue, San Jose, California.

Pacific Gas & Electric Company bill issued to R. Kaplan, 1244 Lick Avenue; San Jose Water Works bill, bearing on the reverse the name Richard R. Kaplan, 1244 Lick Avenue, San Jose.

And a document saying that this is your invoice to Mrs.—I [206] beg your pardon—to Mr. Richard Kaplan, 1244 Lick Avenue, San Jose.

Under make and model it reads, Ply. '47. The license number and State, 1A38276 California. Remove & replace radiator 3.50. Check car for—and I can't read the last word—it looks like it begins with "sh"—and has two other letters—2.50. The

(Testimony of Glenn A. Harter.)

charge for one radiator \$41.00. Total bill, \$48.44, marked paid in full.

Mr. Schnacke: Q. Mr. Harter, did the defendant Shirley Kremen have anything on her person or possession when seen by you containing the name Shirley Kremen?

A. The material I examined did not reflect any such name.

Q. Or anything reflecting the name Mrs. Irving Kremen?

A. Only the names that you just read there. That was the material I observed.

Q. What time did you leave the area around the cabin, Mr. Harter?

A. Do you mean to come to San Francisco?

Q. Finally leave it.

A. We came back to San Francisco and left about 2:30 or 2:40 p.m.

Q. Did you leave by automobile?

A. Yes, sir.

Q. Were you driving that car?

A. No, sir. [207]

Q. Who was driving it?

A. Agent Galligan.

Q. Who was in the car with you?

A. The defendant Ross or Rasi.

Q. Is that all, you, Agent *Gallagher*, and the defendant Carl Ross? A. That is right.

Q. What type of car is that? A 4-door sedan?

A. 4-door sedan.

Q. Where were you sitting?

(Testimony of Glenn A. Harter.)

A. I was sitting in the right rear.

Q. Where was Mr. Ross sitting?

A. In the left rear.

Q. That would leave Special Agent *Gallagher* in the front by himself? A. That is correct.

Q. You say you left the cabin about what time?

A. About 2:30 or 2:40.

Q. You drove where?

A. We came to San Francisco directly from the cabin.

Q. During the course of that ride did you have any conversation with the defendant Steinberg?

A. Yes, sir.

The Court: You have the wrong one.

Mr. Schnacke: With the defendant Ross. I beg your pardon. [208]

Mr. Schnacke: Q. What was the nature of that conversation? What did you say and what did he say?

A. Well, we didn't say very much. We mentioned fishing. I asked him if he enjoyed the fishing and if the fishing had been very good, and he stated no, the fishing was quite poor there. The fish are all quite small. The motor of the car was making quite a bit of noise.

Mr. Gladstein: I didn't hear the last at all. I am sorry.

The Court: He said, "The motor of the car was making quite a bit of noise."

The Witness: It made a lot of squeaky noises like a violin, and I said to Ross, "Does that remind

(Testimony of Glenn A. Harter.)

you of Steinberg's violin playing?" And he stated, "Oh no, he plays much better than that."

The rest of the conversation was maybe about the trees or the road.

Mr. Schnacke: I think I mispronounced the name of the agent who drove the car. I believe I said Gallagher. His name is Galligan?

The Witness: Galligan, that is correct.

Mr. Schnacke: Thank you, Mr. Harter.

The Court: Proceed. [209]

Cross-Examination

Mr. Gladstein: Q. You say, sir, that you took these documents from a purse? A. Yes, sir.

Q. Describe that purse for me.

A. I don't recall the description of the purse.

Q. Can you tell us anything at all about it?

A. No, sir, other than it was in a purse.

Q. Was it a wallet rather than a purse?

A. There was enclosed in the purse a small wallet.

Q. Where were the documents that you have identified? In the purse or in the wallet?

A. The small wallet was in the purse. All the documents were in the purse.

Q. My question was where were the documents, in the purse or in the wallet?

The Court: He said all the documents were in the purse.

Mr. Gladstein: Q. Were they outside of the wallet? A. I don't recall.

(Testimony of Glenn A. Harter.)

Q. Was the wallet empty?

A. The wallet was not empty.

Q. Did the wallet contain the documents that you identified?

A. It may have contained some of them.

Q. As a matter of fact, that wallet you took from inside the premises together with its contents, didn't you? [210]

A. Inside the premises I handed the wallet to Mrs. Kremen.

Q. And it was not in any purse at that time, was it?

A. I don't understand your question.

Q. I say the wallet was not in any purse at the time you handed the wallet to Mrs. Kremen, was it?

A. No.

Q. Where was the purse at that time?

A. I couldn't tell you.

Q. Where did you find the purse before you handed it to Mrs. Kremen?

A. I didn't hand the purse to Mrs. Kremen.

Q. Excuse me, the wallet. Where did you find the wallet before you handed it to her?

A. It was in an open drawer at the foot of the stairs.

Q. Did you yourself take it from the drawer?

A. Yes.

Q. Where was Mrs. Kremen at that time?

A. On the stairs.

Q. Going up, coming down or standing there?

A. Going up.

(Testimony of Glenn A. Harter.)

Q. Was she accompanied by anyone?

A. The matron.

Q. Did you then go upstairs and remain up there for a time? A. Yes, sir.

Q. Do you know whether it was on that occasion that the [211] matron subjected Mrs. Kremen to a personal search?

A. I was downstairs at the foot of the stairs. I wouldn't know.

Q. After some time did they both come downstairs? A. That is correct.

Q. Approximately how long were they away?

A. Well, I couldn't answer specifically. I imagine five minutes.

Q. It was while she was on the stairs going up with the matron that you took hold of the wallet, isn't that so? A. That is correct.

Q. When she came downstairs with the matron where did she then go? A. Outside.

Q. With the matron accompanying her?

A. That is correct.

Q. Did she have a purse with her at that time?

A. A purse and the overnight bag.

Q. After the matron and Mrs. Kremen got outside did you come out with the wallet?

A. No, sir.

Q. Who brought the wallet out?

A. Mrs. Kremen.

Q. When did she obtain it?

A. I gave it to her when she went upstairs. [212]

(Testimony of Glenn A. Harter.)

Q. Did you have a conversation with her before she went upstairs? A. No, sir.

Q. But nevertheless as she went upstairs you handed her a wallet? A. Yes, sir.

Q. Before you or she ever had any words with each other?

A. I had the wallet and I handed it to her. I said, "Is this yours?" There was no conversation whatsoever. She took it and kept on walking.

Q. And went upstairs with it?

A. Yes, I imagine she did.

Q. Did you observe that she went upstairs?

A. She went upstairs and she had it in her hand, yes.

Q. And she came back with it in her hand?

A. I didn't see it when she came back.

Q. But when she came back you saw her with a purse?

A. When she came back she had her purse and her overnight bag.

Q. And then she went outside?

A. That is right.

Q. And then you went outside?

A. That is correct.

Q. And then you say she put the purse down?

A. And the bag. [213]

Q. And the handbag. Then did you look through the contents of both of those? A. Yes.

Q. And it was in the purse that you found the wallet? A. Yes.

Q. The wallet that you had handed to her?

(Testimony of Glenn A. Harter.)

A. Yes.

Q. And it is the purse from which these documents were taken that you identified?

A. That is correct.

Q. What did you find in the suitcase or overnight case? A. Just clothing.

Q. At the time that you handed the wallet to her were there other agents of the Bureau in the immediate part of the premises?

A. Yes, sir.

Q. Did they have their guns drawn, any of them? A. No, sir.

Q. Did you? A. No, sir.

Q. You had previously had, hadn't you?

A. Yes, sir.

Q. Was Mrs. Kremen handcuffed at that time?

A. No.

Q. Was she at any time?

A. I didn't observe her handcuffed at any time.

Q. The others taken into custody were at the time you handed the wallet to Mrs. Kremen in handcuffs?

A. I was in the house. I didn't have observation of the other defendants at that time.

Q. But you saw that they were handcuffed, didn't you? A. While I was in the house?

Q. Yes. The door was open, wasn't it?

Q. You can't see out of the house where I was standing.

Q. Was the door open?

A. I imagine the door was.

(Testimony of Glenn A. Harter.)

Q. Coming back to San Francisco you were riding with Mr. Ross? A. That is correct.

Q. And you were sort of joking there talking about fishing, is that right?

A. We were talking.

Q. I mean you raised the subject?

A. Yes.

Q. In a joking sort of way. A. No, sir.

Q. Did you say anything to him about his family? A. Yes, sir.

Q. What did you say?

A. I asked him if he had a family.

Q. Did he answer?

A. He answered that he did. [215]

Q. Do you know that he did?

A. Pardon?

Q. Do you know that he did?

A. He told me that he did. That is my only knowledge of it.

Q. Did he tell you what his family consisted of?

A. A wife and a child.

Mr. Gladstein: That is all.

The Court: Anything else?

Mr. Schnacke: That is all, thank you.

(Witness excused.)

The Court: We will take the mid-afternoon recess.

(Recess.) [216]

Mr. Schnacke: Clarence Dunker.

CLARENCE W. DUNKER

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the Jury?

A. Clarence W. Dunker.

Q. Please spell your last name?

A. D-u-n-k-e-r.

Direct Examination

Mr. Schnacke: Q. Mr. Dunker, what is your occupation?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And for how long have you been so employed? A. Nineteen years.

Q. And where are you presently assigned?

A. I am assigned at Modesto, California.

Q. And where were you assigned on August 27, 1953? A. At Modesto, California.

Q. Is Modesto an office under the jurisdiction of the San Francisco office of the Federal Bureau of Investigation?

A. It is a resident agency of the San Francisco office. [217]

Q. On August 27, 1953, were you in the vicinity of a cabin at Twain Harte, California?

A. Yes, sir.

Q. And at what time did you arrive at the cabin on that day?

(Testimony of Clarence W. Dunker.)

A. A few minutes after 1 p.m.

Q. And were you present when the defendants Steinberg, Kremen, Ross and Coleman were arrested at that cabin?

A. I was.

Q. What did you do in connection with those arrests?

A. Well, I drove down on the road which is just at the right of the cabin, and I remained there a few minutes while the other boys went to the cabin from other directions, and after a few minutes I walked up to the cabin, and then after I was up there for a short time I went into the house and on instructions, assisted in the search.

Q. And what part of the house did you search?

A. The living room.

Q. And referring to the living room, it is the area on the second page of the set of diagrams at the top portion of the house, is that correct?

A. Yes.

Q. Can you tell us in general how you proceeded with your search of the living room?

A. The first thing I did was to draw a sketch and locate the various pieces of furniture in the room. Then I numbered [218] each one of those pieces with a number, and then I described what that piece of furniture was.

I started with the chair that is near the entrance, and I started my search there, then proceeded around the room.

Q. In a clockwise or counter-clockwise direction?

A. That would be counter-clockwise.

(Testimony of Clarence W. Dunker.)

Q. You say you made a diagram at the time of the search? A. Yes, I did.

Q. Do you have that diagram with you now?

A. Yes, I do.

Q. Would you refer to that diagram—did you refer to that diagram prior to the time you took the witness stand?

A. Oh, yes, I have checked it over.

Q. So your testimony as you are now reciting it to us will be to some extent refreshed by the diagram you drew at the time of your search, is that correct? A. That is right, yes.

Q. (Handing document to the witness) I will show you a group of documents and ask you if you have ever seen those documents before, and, if so, when and where?

Mr. Leonard: Excuse me, Your Honor. If the witness is testifying, as he has indicated, from a written memorandum may we have that memorandum marked for identification so reference can be made to it later on?

The Court: Very well. [219]

Mr. Schnacke: No objection.

The Court: Mark it number 87 for identification.

(Thereupon diagram of agent referred to was marked Plaintiff's Exhibit No. 87 for identification.)

The Court: The question was whether you had seen these papers before.

The Witness: Yes. This was in the three-drawer desk which is shown on this diagram, and from the

(Testimony of Clarence W. Dunker.)

left-hand drawer there was an envelope with return address of Nathan J. Citron, 93 East San Antonio, San Jose. And this envelope contained an insurance policy of the Indiana Lumbermen's Mutual Insurance Company. And that is this thing here, and I initialed it. And travel checks of San Jose Ford Sales addressed to Janet Conroy, 69 North 10th Street, San Jose, postmarked 9/12/53. And a Shell lubrication road form.

Mr. Schnacke: Q. Well, it isn't necessary nor, I think proper for you to recite——

A. (Interposing) All right, yes, I have seen it.

Q. All I asked was whether you had seen those documents, or this document, before. A. Yes.

Q. You said that you had, and that you saw that document and took that document from a desk in the living room? A. Yes, sir. [220]

Q. Is that correct? A. That is correct.

Mr. Schnacke: I will offer this document in evidence at this time solely against the defendant Janet Conroy, Government's exhibit next.

Mr. Leonard: Objected to, if Your Honor please, on the ground it appears to be the results of an illegal search for which no process was issued, and there is no foundation laid in connection with any of the defendants. As counsel of record pointed out, the witness' volunteer answer—(portion of statement inaudible to the reporter)—should be stricken. The document speaks for itself. It cannot lay its own foundation.

Mr. Gladstein: May I add, I understood Mr.

(Testimony of Clarence W. Dunker.)

Schnacke to say he is offering that as against the defendant Janet Conroy?

Mr. Schnacke: As against the defendant Janet Blau. I beg your pardon.

Mr. Gladstein: I think under the circumstances no proper foundation has been laid.

The Court: May I see it? Admitted as against the defendant Blau.

(Thereupon insurance policy referred to above was received in evidence and marked Plaintiff's Exhibit No. 88, admitted as against Defendant Blau.) [221]

Mr. Schnacke: Q. I show you what appears to be a belt and ask you if you have ever seen it before? A. I have.

Q. Where did you see that?

A. I saw that on the straight chair which is in the corner of the room between the radio and the davenport.

Q. And how was that belt situated when you saw it?

A. It was around a pair of trousers.

Q. What type of trousers?

A. They were tan cotton trousers.

Mr. Schnacke: I will ask that the belt be marked for identification Government's exhibit next in order.

(The belt referred to was thereupon marked Plaintiff's Exhibit No. 89 for identification.)

Mr. Schnacke: Q. Now, I will show you Defendant's Exhibit A-12, and ask you if that reflects

(Testimony of Clarence W. Dunker.)

or shows the pair of pants and the belt to which you have just referred?

A. That is the belt and the pair of pants.

Q. And in this photograph I see money protruding from the belt. Was the money in the belt when you saw it?

A. Yes, there was money in the belt. It had two—. Do you want me to testify further?

Q. Yes. How much money was there?

A. In the belt to the trousers were two zipper money pockets containing \$400 and \$50— [222]

Mr. Gladstein: Just a moment. I didn't know the witness was going to read from the document, which is for identification. May I have a continuing objection to this kind of testimony, which is the equivalent of the offer of the exhibits or physical matters, money or whatever it is, for the same reasons we have heretofore advanced?

Mr. Schnacke: I offered it just for identification. He is talking about a belt reflected in the picture you offered into evidence.

Mr. Gladstein: That may be so, but my point is this: the witness is now giving oral testimony to the contents of something, I take it, rather than offering it physically.

The Court: He didn't offer the belt.

Mr. Gladstein: This is something in addition to the belt. He is talking about the contents of the belt, if Your Honor please. The belt is only marked for identification.

(Testimony of Clarence W. Dunker.)

Mr. Schnacke: The photograph of the belt and the photograph of the money——

The Court: He has identified it. He is testifying to something else that relates to the article he identified. I don't get the point.

Mr. Gladstein: I want to object to matters taken, and his enumeration of those matters in this form rather than by offering the matters themselves.

The Court: Oh. Very well. I will overrule the [223] objection.

Mr. Schnacke: Q. Now, then, I will show you a wallet with certain documents inside it and ask you if you saw that wallet and those contents in the course of your search of the living room?

A. I did.

Q. And where did you find those items?

A. This was on the straight chair between the davenport and the radio.

Q. And what was its position on the chair?

A. Well, this was in the trousers, in the back pocket of the trousers which were on the chair.

Q. Are those the trousers that were in the photograph——

A. Those are the trousers that were in the photograph.

Q. ——that you previously looked at?

A. Yes.

Q. And would you examine the documents and tell me where you saw those documents before?

A. Those documents were in the billfold?

Q. All of the documents that are there?

(Testimony of Clarence W. Dunker.)

A. All of the documents that are there were in the billfold.

Mr. Schnacke: I will offer the billfold and the documents just described by the witness for identification, to be marked Government's exhibit next in order.

(Thereupon billfold and documents referred to [224] were marked Plaintiff's Exhibit No. 90 for identification.)

Mr. Schnacke: Q. Now, I will show you a brown wallet containing certain documents, and ask you if you saw that in the course of your search of the living room at the cabin?

A. Yes. This was found in a pair of tan gabardine trousers which were laying on the chair near the entrance to the cabin as shown by the chart.

Q. Will you examine the documents that I handed you? Will you tell me if you observed those during the course of your search?

A. Yes, I did, and they were in the billfold.

Mr. Schnacke: I will ask now that the billfold and the documents just referred to by the witness be marked Government's exhibit next in order for identification only.

(Thereupon billfold and documents referred to were marked Plaintiff's Exhibit No. 91 for identification.)

Mr. Schnacke: No further questions. Thank you.

Cross Examination

Mr. Gladstein: Q. Just a question or two, Mr.

(Testimony of Clarence W. Dunker.)

Dunker: What time did you arrive there at Twain Harte?

A. You mean at the cabin where the individuals were?

Q. Yes. [225]

A. It was about 1:05 to 1:08, I believe, when I drove up there.

Q. What time did you leave Modesto?

A. I left Modesto approximately 11 o'clock.

Q. That morning?

A. The following—I mean the preceding evening.

Q. Eleven o'clock p.m.?

A. Eleven o'clock p.m. the preceding evening.

Q. On this same task or assignment?

A. Yes.

Q. Had you been to the premises before the 27th of August? A. No, I had not.

Q. When you left Modesto about 11 o'clock p.m. were you alone or with someone else?

A. I left alone.

Q. And you joined others somewhere, did you?

A. Yes, on route.

Q. You didn't go to the house that night?

A. No. You mean the Germany cabin? No, I did not.

Q. The first time you ever went there was the following afternoon at the time you have stated?

A. Yes.

Q. Were you in the area of Twain Harte during the morning, the early hours, of the 27th?

(Testimony of Clarence W. Dunker.)

A. Yes. [226]

Q. Were you with other agents near the premises?

A. Well, I drove by the premises, a road that leads some distance from the premises, but I didn't go up to the premises. It sets back a considerable distance from the road.

Q. What time of day was it when you drove by some little distance from the premises?

A. It was approximately 3 o'clock in the morning.

Q. When you drove by, did you occupy at any time a position from which you could see the house or its occupants? A. No.

Mr. Schnacke: Your Honor please, I am going to object because I don't see the propriety of this in view of the scope of the direct examination of this witness. He testified to a search of the living room.

The Court: Well——

Mr. Schnacke: What happened at 3 o'clock——

The Court: It is beyond the direct examination.

Mr. Gladstein: May I be permitted one more question?

Mr. Gladstein: Q. Were you alone or with others at approximately 3 o'clock in the morning?

A. I was with others.

Q. Will you tell me the names of the others?

A. Yes.

Mr. Schnacke: Well, if Your Honor please, I will make the objection that that is immaterial. I

(Testimony of Clarence W. Dunker.)

just don't understand [227] how this is proper cross examination in view of the scope of the direct.

Mr. Gladstein: There has been testimony concerning the first time certain agents appeared, and I believe it would be proper. Very limited.

The Court: It is a sort of discovery proceeding. I don't see that it bears—if it has any reasonable bearing on the direct examination, of course, the Court should allow it, but I just don't see it.

Mr. Schnacke: The agents are available to the defense to call as witnesses——

Mr. Gladstein: Mr. Schnacke says the agents are available for the defense to call as witnesses, but obviously I can't do that until I know who they are, and that is all I am asking for, who was with him at the time he went by there at 3 o'clock in the morning.

Mr. Schnacke: Then are you going to inquire as to the day before that and the day before that and six months before that?

The Court: Well, let's not get into an argument. I will sustain the objection.

Mr. Gladstein: Your Honor, this is a slightly different question.

Mr. Gladstein: Q. May I ask if the other persons who were with you at 3 o'clock in the morning were FBI agents, [228] without regard to their names?

Mr. Schnacke: Same objection.

(Testimony of Clarence W. Dunker.)

The Court: What difference does that make?
Let's get through with this testimony.

The Witness: They were.

Mr. Gladstein: That is all, Your Honor.

The Court: Anything further?

Mr. Schnacke: No, that is all, thank you.

(Witness excused.)

Mr. Schnacke: Mr. Daly.

JOSEPH T. DALY

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury? A. Joseph T. Daly.

Q. Will you spell your last name?

A. D-a-l-y.

Direct Examination

Mr. Schnacke: Q. Mr. Daly, what is your occupation?

A. Special Agent of the Federal Bureau of Investigation.

Q. How long have you been an agent of the FBI? [229]

A. Eleven and one-half years.

Q. To what office are you assigned?

A. San Francisco Division.

Q. For how long have you been assigned to San Francisco? A. Nine years.

(Testimony of Joseph T. Daly.)

Q. Were you assigned to San Francisco in August and September of last year? A. I was.

Q. In the latter part of last year did you have occasion to go to a cabin at Twain Harte, California? A. I did.

Q. Is that the cabin at which four of the defendants in this case had previously been arrested?

A. That is correct.

Q. And on arriving at the cabin—. On what date did you go to the cabin?

A. August 27, 1953.

Q. And did you go to the cabin at a later date?

A. I did.

Q. What date was that?

A. On, I believe, September 2nd, 1953.

Q. And on September 2nd, 1953, what did you do at the cabin?

A. I was assigned to go through the garbage cans at the rear of the cabin and dust the cans for fingerprints.

Q. Did you do that? [230] A. I did.

Q. I will show you a box containing ten cans and ask you if you will look at those cans and tell me if you have ever seen those before, and, if so, when?

A. Yes, these are the cans that I found at Twain Harte on September the 2nd.

Q. Now, referring to the diagram before you, can you tell us where on the premises you found those cans?

A. On the chart, which shows the whole grounds,

(Testimony of Joseph T. Daly.)

the first page, it is assigned "outhouse". It is in the rear. It is labeled "outhouse." About 20 feet in the rear of the cabin.

Q. And were these cans inside that house or adjacent to it?

A. They were inside the house, in a garbage container.

Q. I see. That outhouse was used for what purpose?

A. It was a toilet that wasn't being used at the present time, but was being used to house the garbage can.

Q. And it was in the search of that little outhouse that you discovered these cans?

A. That is correct.

Q. You have mentioned dusting for fingerprints. Will you tell us what that means?

A. That is a process where you take a fine powder with a little brush, dust over the surface of the can in an attempt to have latent fingerprints be shown out. I preserved them [231] after that and identified the cans.

Q. And how did you preserve them?

A. With scotch tape over the prints.

Q. And did you mark the cans in any way?

A. I did.

Q. How did you mark them?

A. I marked them with my initials "JPD", and I scratched the date on the cans with a nail.

Q. And your initials then, would appear on each can that you have just examined?

(Testimony of Joseph T. Daly.)

A. That is correct.

Q. Did you develop latent prints on each of the cans that I have shown you previously?

A. On each of the cans there were latent prints shown to be on the cans.

Q. What did you do with the cans after you had assembled them at the cabin?

A. After putting the scotch tape over the prints, I returned them to one of my supervisors in San Francisco.

Q. Do you know what happened to them after that time?

A. No, not of my own knowledge.

Q. Mr. Schnacke: I will ask that the ten Budweiser beer cans described by this witness be received in evidence as a group at this time. I think it would be convenient for them to remain in the box. On the assurance that they will be [232] connected up by further testimony.

Mr. Gladstein: Well, may I ask counsel again which one or more of the defendants he intends to connect these up with, because my point of objection would depend on that statement.

Mr. Schnacke: The cans will be connected up with each of the defendants. One or more of the cans will be connected up with each of the defendants.

Mr. Gladstein: Each of the five?

Mr. Schnacke: Each of the five.

Mr. Gladstein: I make the same objection as I made before. There is no proper foundation laid.

(Testimony of Joseph T. Daly.)

The Court: Well, they are just—instead of putting them in for identification, he is putting them in evidence for the purpose of showing the limited purpose of where they came from, that is all.

Mr. Gladstein: He is not offering them just for identification, he is offering them in evidence.

The Court: But their value in evidence is only to the limited extent at this point. What are you wasting a lot of time about this for? Are you going to connect these up further with some other evidence?

Mr. Schnacke: Yes, with each of the defendants and with Robert Thompson.

The Court: All right, admitted for the purpose stated, [233] to get it over with.

(Thereupon the beer cans referred to above were received in evidence and marked Plaintiff's Exhibit No. 92.)

Mr. Gladstein: May the record show I have made the same objections to this last exhibit as to the previous exhibits?

The Court: Very well.

Mr. Schnacke: No further questions.

The Court: If it isn't connected up the Court will strike it out.

Mr. Gladstein: Of course my objection goes beyond that, Your Honor.

The Court: Anything else of the witness?

Mr. Schnacke: No, I have no further questions.

(Testimony of Joseph T. Daly.)

Cross Examination

Mr. Gladstein: Q. Mr. Daly, did you say you were up there on the 27th of August?

A. I was.

Q. And what did you do when you were there on the 27th?

A. On the 27th I was assigned as an auxiliary with no specific duties, to assist anyone that I should.

Q. And whom did you assist?

A. Mr. Whalen. [234]

Q. He was the agent in charge?

A. Agent in charge.

Q. Did you participate in the search that was made at that time? A. No, I did not.

Q. Did you observe a search was being made?

A. Yes.

Q. What portion of the yard or the premises did you observe under search?

A. I noticed that there were agents searching inside the house.

Q. Yes? Anything else?

A. Not to my recollection.

Q. Now, this was broad daylight at the time the people were taken into custody, wasn't it?

A. That is correct.

Q. The outhouse was plainly visible from the premises and the place where you were, is that so?

A. That is right.

Q. Did you go over there?

A. I did not.

(Testimony of Joseph T. Daly.)

Q. Did you observe anyone ever go over there?

A. No.

Q. What is that? A. I did not, no. [235]

Q. Did you say no one ever went there?

A. No, I did not. I didn't observe anyone go over there at the time.

Q. How many agents were there there at the time?

A. In the vicinity, approximately 15.

Q. How far was the outhouse from the premises?

A. About 20 feet.

Q. Was there a garbage can in the house?

A. I don't recall if there was or not.

Q. Did you see that the premises were searched thoroughly?

A. That wasn't my assignment at the time.

Q. I am asking you if you observed, if you saw whether the premises were thoroughly searched?

Mr. Schnacke: I object to that as calling for an opinion and conclusion of the witness.

The Court: Sustained.

Mr. Gladstein: Q. Were there agents outside of the house for a portion of the period?

A. Yes.

Mr. Schnacke: I object to that, as I should have objected all along, as being outside the scope of the direct examination.

Mr. Gladstein: The witness was asked if he was there on the 27th. That was on direct examination. I am now inquiring about it. He was asked if he had been there and he said he was there the 27th,

(Testimony of Joseph T. Daly.)

and he was asked if he [236] came at a later time.

The Court: Well, that doesn't, I think, open the door to most extensive cross examination, which should be confined to whether or not the man was there that day. That is the subject matter.

Mr. Gladstein: The 27th?

The Court: Yes.

Mr. Gladstein: Which man, Your Honor?

The Court: The man that is on the witness stand.

Mr. Gladstein: Yes, he said he was there.

The Court: That doesn't mean that that subject opens up everything under the sun. The only subject opened up for cross examination is whether he was there that day.

I am just saying that for the purpose of shortening the time. My inclination is to allow great liberality in cross examination if there is anything in the testimony that relates to the subject matter, but that is going a little too far afield.

Mr. Gladstein: Q. After the defendants—you saw the defendants taken into custody on the 27th, didn't you? A. I did.

Q. Did you remain after they had been taken away? A. I did.

Q. Were there others who remained with you?

A. There were. [237]

Q. How long, approximately, did you remain there? A. Till midnight.

Q. Approximately how many were there with you?

(Testimony of Joseph T. Daly.)

A. I believe three or four other agents.

Q. Were you stationed in or out of the house, or both in and out? A. Both.

Q. Did you go to the outhouse?

A. I did not.

Q. Did you observe any other agent go to the outhouse? A. No, I did not.

Q. Who were the agents who were with you there at midnight?

A. Mr. Dunker—Agent Dunker. N. L. White. Robert Savage. I believe there was another agent, but I do not recall his name.

Q. While you were there up to midnight—withdraw that.

By the way, without inquiring as to anything confidential about your duties with the Bureau, I would like to ask you whether your assignment at that time, or maybe generally, has something to do with the obtaining of fingerprints?

A. No, other than general criminal investigative work. I am not a fingerprint technician.

Q. But in your general work apparently you know something about obtaining them, is that right?

A. Latent prints, that is right. [238]

Q. What did you do, if anything, to obtain latent prints when you were there up until midnight? A. Nothing.

Q. What did anybody else, to your observation, do?

(Testimony of Joseph T. Daly.)

A. I didn't note anyone else taking prints in the house or around the house.

Q. So it is your testimony that nothing was done until you left the house at midnight on the 27th to look for and find any latent fingerprints?

Mr. Schnacke: That isn't his testimony at all, Mr. Gladstein. His testimony was that he didn't observe anybody doing it.

Mr. Gladstein: Q. Is Mr. Schnacke stating it correctly? A. That is correct.

Q. Did you later learn, sir, that some other agents of the FBI had sought to obtain latent fingerprints at or about the premises that day?

Mr. Schnacke: I will object to that as calling for hearsay and an opinion and conclusion of the witness.

The Court: Sustained.

Mr. Gladstein: Q. Now, the other agents and you, did you take up until midnight some station or something to prevent or keep people out?

Mr. Schnacke: I am going to renew my objection that this is immaterial, beyond the scope of the direct examination. [239]

The Court: Well, I think that counsel may be within limits if he wants to show what the situation in the locality was, for whatever he feels it is worth.

Mr. Gladstein: Thank you, Your Honor.

The Witness: My duties up to midnight were, after Mr. Whalen left with the agents, I was

(Testimony of Joseph T. Daly.)

guarding the premises. Assisting in guarding the premises.

Mr. Gladstein: Q. Guarding the premises against what? A. Intruders.

Q. Were the premises kept under guard by you until midnight—you and the others?

A. That is correct.

Q. And by the premises, what do you mean?

A. The house at Twain Harte. The cabin where the agents were located.

Q. The house itself?

A. Yes, the house itself. [240]

Q. The house itself?

A. The house itself.

Q. What about the outhouse? Did you guard that? A. Not specifically.

Q. Did any of the agents with you guard the outhouse?

A. The way the grounds are set up, there is one roadway to it. We were in the house, and looking around in the area around the house, we were not specifically guarding the outhouse; we were guarding the general area.

Q. Let me put it this way: While you were there until midnight or thereabouts, you and the other agents who were with you did have the house under guard? A. Yes.

Q. To prevent intruders, as you said, and did anybody come and intrude? A. No.

Q. Did you have the outhouse under such ob-

(Testimony of Joseph T. Daly.)

servation as to be able to say to us under oath whether anybody went in there?

A. I would say that no one had gone in there, although we did not have it under direct observation all the time.

Q. So you do not know, is that it?

A. That is correct.

Q. You left about midnight of the 27th?

A. Yes.

Q. Was there anybody left there in charge?

A. No.

Q. All the agents left at the time?

A. Yes.

Q. Nobody came to replace you, or whatever the expression is?

A. No, no one came to replace us.

Q. So from midnight on the house was left unguarded? A. Yes.

Q. The outhouse as well? A. Yes.

Q. Was that the situation that obtained until the 2nd of September, to your knowledge?

A. Yes.

Q. On the 2nd of September you returned for the first time to the premises? A. Yes.

Q. You had an assignment to perform?

A. Yes.

Q. What was the assignment?

A. To dust the cans in the garbage can?

Q. Who told you there were cans in the garbage can? A. Mr. Al Clark.

Q. Is he an agent? A. Yes.

(Testimony of Joseph T. Daly.)

Q. When did he tell you that?

A. On the 2nd he asked me to go up and I left and went up. [242]

Q. Did he specifically mention cans in the garbage can? A. Yes.

Q. Did he tell you where the garbage can was located? A. Yes.

Q. Where did he say they were located?

A. In the outhouse.

Q. Was he with you on the 27th?

A. Earlier in the day.

Q. He was with you on the 27th at the premises?

A. Yes, in the original raiding party.

Q. In the original raiding party?

A. Yes.

Q. Did you go to the outhouse on the 27th, inside of it?

Mr. Schnacke: I submit that has been asked and answered.

Mr. Gladstein: I am not sure I did ask it, if Your Honor please. If I did, I ask permission again to ask it.

The Court: Q. Do you remember whether you went there on the 27th?

A. I don't recall whether I specifically went there or not.

Mr. Gladstein: Q. Did you finish your answer?

A. Yes.

Q. Did you observe Mr. Clark go there?

A. No, I did not.

Q. At the time you left at midnight did you

(Testimony of Joseph T. Daly.)

take any of the contents of the house with you?

A. No, I did not.

Q. Did any of those with you take anything from the house?

A. I don't recall. I left by myself. The other agents left. We had our own cars, and I don't recall whether they did or not.

Q. Did you observe Mr. Erickson there that day?

A. Yes, I did.

Q. Did you observe him taking or requiring others, asking others to take large quantities of documents and other things out of the house?

A. Will you restate the question?

(Question read.)

The Court: That is a pretty complicated question: Did he see anybody or did he see anybody required——

Mr. Gladstein: I will withdraw it.

Mr. Gladstein: Q. Did you see Mr. Erickson taking things out of the house and taking them away?

A. No, I did not.

Q. Did you see anybody else do that? I mean any other agent?

A. No, I don't recall seeing any agent taking anything out of the house.

Q. Were there any cans, open or closed, of beer in the premises that you were in?

A. Yes.

Q. On the 27th?

A. On the 27th, yes. [244]

Q. Where did you see them?

A. There were cans in the kitchen, some opened,

(Testimony of Joseph T. Daly.)

some—I think there was a case of six cans that were in the kitchen—beer cans you are speaking of——?

Q. Yes.

A. Beer cans in the kitchen also.

Q. Can you tell us how many there were?

A. No, I didn't count them. I imagine empty beer cans around the kitchen, there appeared to be four or five.

Q. Did you place any mark on any of them?

A. No, I did not.

Q. Did you see anybody else do so?

A. No, I did not.

Q. When you got back on the 2nd of September did you observe whether or not those beer cans were there? A. I did not.

Q. You went directly to the outhouse?

A. That is correct.

Q. This was Mr. Clark telling you that there were some cans in the garbage can?

A. The garbage was contained in the outhouse in the rear of the cabin, and to dust those cans for latent fingerprints.

Q. He told you there were such cans, did he?

A. Yes.

Q. Was there anything else that he told you that you can [245] recall as to what your assignment or instructions were?

A. No, I don't recall anything in addition.

Q. What kind of garbage can was this in which you found these cans?

(Testimony of Joseph T. Daly.)

A. I believe it was a heavy composition paper-type barrel, garbage disposal, make-shift barrel where they store the cans.

Q. Was it a barrel or a crate?

A. A barrel, a round affair. It could possibly have been metal. It was a round barrel affair.

Q. Did you dust the barrel for any latent fingerprints? A. No, I did not.

Q. Did you dust the outhouse, any part of it, for latent fingerprints? A. No, I did not.

Q. Did you dust anything in the house itself for any latent fingerprints? A. No, I did not.

Q. Did you dust any of the documents or boxes, suitcases, and so forth, for latent fingerprints?

A. No.

Q. What equipment did you take up there with you?

A. It is a small kit with fingerprint dusting powder, a small camel's hair brush, it also includes a flashlight and a small camera to take photographs of fingerprints.

Q. A camera to take photographs of fingerprints? [246]

A. Yes. It is included in the kit. You asked me what equipment I took.

Q. Yes. A. That is what I took.

Q. Did you go alone or were you accompanied by somebody? A. I was alone.

Q. In doing your work there at the outhouse with these cans, you were alone? A. I was.

(Testimony of Joseph T. Daly.)

Q. Where did you perform the actual taking of the latent fingerprints?

A. Out on the ping-pong table that was there on the side of the cabin in the game and parking area, as shown on the map.

Q. Before you went there on the 2nd were you provided with any fingerprints of any kind?

A. No, I was not.

Q. Had you seen any of these defendants?

A. No.

Q. Will you tell us how you proceeded to take the cans from the location in which you first found them to the place where you did the dusting?

A. I took the whole garbage can, brought it up next to the ping-pong table, took each can one by one, and dusted them with the powder. Then I put them in a container. If there appeared to be latent prints produced on the cans, I would put scotch [247] tape over the prints. I identified the cans with my initials and the date and put them in another container.

Q. Do you recall how many cans you found latent fingerprints apparently on?

A. I do not.

Q. Can you tell us anything at all about the latent fingerprints you did find on any can?

(Question read.)

Mr. Schnacke: I think that is a kind of broad question.

Mr. Gladstein: Maybe it is broad, in which case I will particularize it.

(Testimony of Joseph T. Daly.)

Mr. Gladstein: Q. You have told us that you examined a number of cans? A. Yes.

Q. Do you remember the exact number?

A. I do not.

Q. You do not remember the number of cans on which you found any fingerprints at all?

A. No, I do not.

Q. Is it correct that there were cans on which you found no fingerprints? A. Yes.

Q. But you do not know how many?

A. Yes.

Q. You are saying on some cans you did find some fingerprints? [248] A. Yes.

Q. You can't tell us on how many?

A. No.

Q. Can you tell us what prints, that is, in number or anything about them that you found on any particular can or any of them?

Mr. Schnacke: You mean whose prints, Mr. Gladstein?

Mr. Gladstein: No, I didn't ask him that.

Mr. Gladstein: Q. For instance, let me ask this: Did you make a record or a notation, a report or notation on a can to indicate—I say this by way of illustration to you—that you saw what appeared to be a thumbprint or an entire set of prints?

A. No.

Q. You did not do that? A. No.

Q. Do you have any recollection of whether you found on any of the cans any full set of prints?

A. Yes, I can recall that I did not.

(Testimony of Joseph T. Daly.)

Q. You did not? A. Yes.

Q. Can you recall the extent to which you found any prints on any of the cans?

A. Yes, some would have one fingerprint, some would have two, three, maybe four. On different portions of the can there [249] would be several. It varied with the different number of cans.

Q. So that those cans on which you found what appeared to be some latent prints you placed a piece of scotch-tape on them?

A. Over the print, yes.

Q. Then what did you do with the cans?

A. I put them in a container and returned them to Al Clark in San Francisco, Agent Clark in San Francisco.

Q. When? A. The very day.

Q. What did you do with the cans on which you found no prints?

A. Disposed of them, left them there.

Q. Where? A. Where I obtained them.

Q. Where was that?

A. In the outhouse.

Q. You took them right back to the outhouse?

A. Yes.

Q. And put them in the barrel? A. Yes.

Q. Were all the cans that you took back to San Francisco empty or were some full?

A. All empty.

Q. The last time that you ever saw those cans then up to [250] today was when you turned them over to Mr. Clark? A. Yes.

(Testimony of Joseph T. Daly.)

Q. And before coming in this afternoon you had not again seen these?

A. Yesterday I glanced at them—yesterday I did glance at the cans, yes.

Q. Where were you when you glanced at them?

A. I think they were in Mr. Schnacke's office.

Q. What kind of piece of paper or other marking was it that you placed on the can?

The Court: He said several times scotch-tape.

Mr. Gladstein: Q. Is the tape still on them?

A. I believe so, yes.

Q. On all of them you can identify it?

A. Yes.

Q. Did you wrap these cans in the cellophane in which they now are? A. No.

Q. Will you examine those and tell us if you find a tape on each one of them?

A. Each individual can or do you want one as an example?

Q. Give me one as an example, if you will, first.

A. Right here (indicating). It is hard to see. There is scotch-tape there, see? This is holding—this is broad scotch-tape going completely around the can. [251]

Q. This one that you are showing me?

A. Yes, right here.

Q. Will you take the trouble to look through each of those and see if you find a piece of scotch-tape on each?

(Testimony of Joseph T. Daly.)

The Court: Q. Does that have any effect on whatever is under the scotch-tape?

A. No, it is being preserved. I am just ascertaining if there is a scotch-tape, as he requested, on each can.

(After examining the cans referred to:)

A. (Continuing): Yes, there is scotch-tape on each can.

Mr. Gladstein: Q. How many cans are there?

A. Ten.

Q. Is there any mark on the cans that identifies them to you? A. There is.

Q. What is it?

A. My initials, J.T.D., and then the number 9253, which stands for September 2nd, 1953.

Q. That appears on each of them?

A. Yes.

Q. Where did you place those initials on the cans? A. On the end of each can.

Q. I mean where were you when you did that?

A. Right there at the scene after dusting them by the cabin.

Q. Did you dust anything besides those cans?

A. Yes.

Q. What else? [252]

A. Other articles in the garbage can.

Q. What?

A. Well, there was a mustard jar, I think there was a catsup bottle, mostly beer cans. That is all that I can recall.

(Testimony of Joseph T. Daly.)

Q. Did you dust anything for prints that was anywhere else than in the garbage can?

A. No, I did not.

Q. When you went to the premises there on the 2nd of September did you have any authority by way of search warrant? Did you have a search warrant with you? A. No, I did not.

Q. Did you seek the permission of anyone to make that search?

Mr. Schnacke: I will object to that as being immaterial, Your Honor please.

The Court: Sustained.

Mr. Gladstein: Q. Do I understand you are regularly connected with the Department here in San Francisco? A. That is correct.

Q. And generally available here?

A. That is correct.

Q. So if there were any requirements of getting further testimony from you, you would generally be available here?

A. Yes, I am assigned to the San Francisco office. I am a resident agent at Stockton, but I am available. I am assigned to San Francisco but I reside at Stockton, California, but I [253] am available.

Q. Just one further question: When you went up there on the 27th did you go from San Francisco or Stockton? A. The 22nd?

Q. The 27th.

Mr. Schnacke: I will object to that as immaterial.

(Testimony of Joseph T. Daly.)

The Court: Sustained.

Mr. Gladstein: Q. When you went up there on the 2nd did you proceed from San Francisco or Stockton?

Mr. Schnacke: Same objection.

The Court: Same ruling.

Mr. Gladstein: That is all.

Redirect Examination

Mr. Schnacke: Q. Did you manufacture these fingerprints on here? A. I did not.

Q. Did you use any trick or device to get somebody to put those fingerprints on there?

A. I did not.

Q. Do you have any way of knowing what agents of the F.B.I. might or might not have been in the outhouse on the 27th? A. I do not.

Q. Or on the 28th, 29th or 30th?

A. I do not. [254]

Mr. Schnacke: That is all.

The Court: Anything else?

Mr. Gladstein: Yes.

Recross Examination

Mr. Gladstein: Q. Do you have any way of knowing how the beer cans got into the container in which you found them on the 2nd of September?

A. No, I do not.

Q. Do you have any way of knowing how they were brought to the premises by the 2nd of September? A. Excuse me?

(Testimony of Joseph T. Daly.)

Q. How they were brought to the premises?

A. No.

Q. Do you have any way of knowing when they first came to the premises and went into that container?

A. No.

Q. Do you have any way of knowing whether those prints are a day old, five days old or five months old at the time you found them?

A. A day—repeat that, please.

Q. Do you have any way of knowing whether at the time you found the prints on those cans they were a day, five days or five months old?

A. As I understand, a print five months old will not come out like these prints came out. Not being an expert, I would say [255] I have no way of telling what length of time the prints were on the cans, no.

Q. Do you have any way of knowing where a person could have been who put fingerprints on or held any of those cans on which the prints went?

A. No.

Q. Do you have any way of explaining to us why you did not take those cans into your custody and dust them for fingerprints on the 27th of August, at the time of the arrest?

Mr. Schnacke: I object to that.

The Court: That is argumentative. Sustained.

Mr. Gladstein: That is all.

The Court: We will take an adjournment now, ladies and gentlemen of the jury, until tomorrow

morning at 10:00 o'clock. Please return at 10:00 o'clock.

(Whereupon this cause was adjourned to the hour of 10:00 o'clock a.m., Thursday, April 15, 1954.) [256]

The Clerk: United States vs. Kremen, et al., further trial.

Mr. Schnacke: Ready, Your Honor. Call Henry Warren.

Your Honor please, this is a witness going on somewhat out of order, but for his convenience and because he is a short witness we will put him on at this time.

HENRY JAMES WARREN

called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the jury.

A. Henry James Warren.

Q. Speak up a little louder, please.

A. Henry James Warren.

Q. W-a-r-r-e-n? A. Yes.

Direct Examination

Mr. Schnacke: Q. Mr. Warren, what is your occupation?

A. Senior plant quarantine inspector, California Department of Agriculture. [259]

Q. You are employed by the State of California? A. Yes, sir.

(Testimony of Henry James Warren.)

Q. On August 20th, 1953, where were you stationed?

A. At Dorris, California; the inspection station there, sir.

Q. Where is that inspection station located with respect to the California State border and the highway in California?

A. It is on Highway No. 97. It comes from Klamath Falls down the Lead.

Q. How far is that from the State Line?

A. About four miles, sir.

Q. What is an inspection station, as you have described it?

A. The State of California maintains an inspection station at each of their ports of entry for the covering of laws and regulations set up by the Department of Agriculture to prevent the entry of insects and plant diseases into our state.

Q. With respect to incoming automobiles, what do you do? What does the inspection station do?

A. We stop all incoming cars and merely check the baggage, the car contents, household goods, to see if there are any plant materials within the car or the baggage.

Q. And is some record made of this inspection?

A. Yes, sir, we maintain a record.

Q. Are those records maintained in the ordinary course of business of the inspection station?

A. Yes, sir. [260]

Q. At my request have you brought certain records with you?

A. Yes, sir.

(Testimony of Henry James Warren.)

Q. Do you have them on your person?

A. I have left them on the chair. Would the Court excuse me long enough to get them?

Mr. Schnacke: Yes, please.

(Witness left the witness stand and returned.)

Mr. Schnacke: Q. What record have you got with you?

A. We have the daily record that we maintained for August 20, 1953.

Q. Are those records just of that day?

A. Yes, sir.

Q. And what information is reflected on those records?

A. On each car that enters the state a record is maintained of the license of the car and the number of occupants of the car.

Q. The license number and the number of occupants? A. Yes, sir.

Q. And included within the license number, is the state issuing the license also designated?

A. Yes.

Q. Unless it is the State of California, I take it, and then there is no such designation?

A. Yes.

Q. Is the time of entry noted in any way? [261]

A. Yes, sir, we have the time the sheet was started and when it is completed. There are 50 cars to a sheet.

Q. By looking at that sheet you can tell within

(Testimony of Henry James Warren.)

a time period when that car entered, but not the exact time the car entered, is that right?

A. Yes, sir.

Q. Mr. Warren, I notice a column divided into two parts that is headed, "Passengers." Under that is "Cal" and then the other column "For." What is that for?

A. It is what number of passengers is from California or foreign passengers. We designate them the same as the license. We make a division between California cars returning and a foreign car entering.

Q. And all passengers in a car bearing a California license are deemed to be Californians, is that the procedure? A. Yes, sir.

Q. You don't ask each person coming in what his state of residence is? A. No, sir.

Mr. Schnacke: I will offer the document described by this witness as Government's exhibit next in order; and I will ask that the document, being a State of California document, may be withdrawn at a later time and a photostat of the entire document substituted.

Mr. Leonard: We object to the introduction in evidence of [262] the document on the ground no proper foundation has been laid. It is incompetent, irrelevant and immaterial.

The Court: Well, there is only some part of it, I suppose, you want?

Mr. Schnacke: Only some part of it, yes, Your Honor.

(Testimony of Henry James Warren.)

The Court: Can't you read what you want?

Mr. Schnacke: Suppose I introduce the document for identification at this time, and for identification only at this time?

The Court: Whatever you wish. I was just wondering whether you want to encumber the record with something that has many pages if there is only a small part of it you wish.

Mr. Schnacke: Well,—

The Court: Can't you agree on the particular part that you want?

Mr. Gladstein: We will agree, Your Honor, that counsel may refer to just that portion of it he wants to refer to. We don't raise any requirement that the whole document be used, nor do we have any objection to its being withdrawn and photostatic copies substituted. It is simply the legal objection.

The Court: Why don't you read what you want into the record? Wouldn't that serve the purpose?

Mr. Schnacke: Yes, it would.

The Court: I am thinking about a long document going into [263] the record when you only want a part.

Mr. Schnacke: I will offer in evidence at this time the top notation in the right-hand column on Sheet No. 10 of the document described by the witness.

Mr. Leonard: To which we object, if Your Honor please, on the ground no foundation has been laid. It is incompetent, irrelevant and immaterial.

(Testimony of Henry James Warren.)

Mr. Schnacke: I will promise to connect it up.

The Court: May I see it?

(Document handed to the Court.)

The Court: The top line of——

Mr. Schnacke: The right-hand column.

The Court: You are offering it for the purpose of showing that on that day a car described came into California?

Mr. Schnacke: Yes, Your Honor.

The Court: All right, I will overrule the objection.

Mr. Schnacke: On page 10 of the document described by this witness, which reads, "Time started 3:30 p.m.; time finished 4:20 p.m., dated August 20, 1953."

The entry to which I have referred shows, "Passengers, foreign — f-o-r — four. Car number. State. Car number C-54-274. State: Missouri."

Is there any objection to this document being returned to the files of the State of California?

Mr. Gladstein: No objection on that score. We might want [264] to use it for examination, Mr. Schnacke.

Mr. Schnacke: It will remain, then, marked for identification until——

Mr. Gladstein: No, I didn't mean that.

The Court: He simply means he wants to wait until he examines.

Mr. Schnacke: Oh. I have no further questions of Mr. Warren.

(Testimony of Henry James Warren.)

Cross-Examination

Mr. Gladstein: Q. Mr. Warren, approximately how many inspection stations are there, if you can tell us, at the boundaries of the State of California?

A. Yes, sir. The State maintains around 18 summer seasonal, opened around during the summer months and close down, but as a general rule about 18.

Q. So there would be about 18 during the month of August? A. Yes, sir.

Q. Can you tell us when you first received an inquiry, if you did receive one, concerning this item that you have brought a record of?

A. Several months ago there was an F.B.I. agent come to the station there and asked to see our records, showed his credentials, and on a certain date, and we got them out, which we cooperate with everyone, and let him examine them, and at [265] that time no mention was made——

Q. (Interposing) I understand. All I want to know is when it happened. A couple of months ago?

A. Yes.

Q. Can you fix that as precisely as you can? This is April. About mid-April of 1954.

A. Several months ago, sir. It is rather difficult. It is rather routine. We don't set it aside. Within the last six months, seven months. Within that period. Could only be three. You are trying to establish when they asked for the record, sir?

Q. Yes. When they came down and wanted to look at your records.

(Testimony of Henry James Warren.)

A. Sometime after that August date. Within the last four, five, six months, maybe.

Q. Can you tell us whether it was in 1954 or 1953?

A. No, sir. It would make no difference, would it?

Q. You will pardon me, sir——

The Court: He just wants to know if you remember. If you don't remember——

The Witness: A. No, sir, I don't remember.

Mr. Gladstein: Q. When the F.B.I. agent said he wanted to look at your records, did he indicate to you what particular record he wanted to look at?

A. Yes, sir, he asked to see our daily record of the cars entering the State on a particular day or within a certain [266] period.

Q. Which was it?

A. I mean to say, he wanted the records of a certain period of days. Probably covering within that period.

Q. I don't want any "probably." Did you have a conversation with him? A. No, sir.

Q. Then you don't know what he asked for, do you?

A. I know he wanted to see the records. I come in when he was looking through the record.

Q. He had already had it? You saw him, at the time you came in, already there?

A. Yes, sir.

Q. And was it some other member of your station or employee there who was with him?

(Testimony of Henry James Warren.)

A. Yes, sir.

Q. Somebody else had turned this record over to him?

A. Yes. We make it available to anybody that asks.

Mr. Gladstein: I move that be stricken, Your Honor.

The Court: Well, it isn't important.

Mr. Gladstein: No, it isn't important.

Mr. Gladstein: Q. Then you don't know yourself what that F.B.I. agent asked for prior to the time you got there, isn't that right?

A. I would assume he asked to see the record. He was looking [267] at it.

Mr. Gladstein: I am going to move to strike that, Your Honor.

The Court: Well, it is obvious he doesn't know.

Mr. Gladstein: Q. Did you talk to this F.B.I. agent yourself? A. Yes, sir.

Q. All right. At the time you first saw the F.B.I. agent, did you observe whether he had records for one day, three days or a week, or anything of that sort?

A. He had them for quite a period of time.

Q. I see. Did he tell you whether he was looking for a particular registration number?

A. No, sir.

Q. When he left, did he take with him any of your records? A. No, sir.

Q. At the time that he left had any marks been

(Testimony of Henry James Warren.)

made by him on your—or anybody else in your presence, on any of your records? A. No, sir.

Q. The information that has been read by Mr. Schnacke appears on a page on a line in which there are two parallel lines in red crayon or pencil, is that so? A. Yes.

Q. At the time the F.B.I. agent left you those marks were not [268] on this page?

A. No, sir.

Q. What is that?

A. They weren't on the page when he left.

Q. Did you put them on there? A. Yes.

Q. When?

A. About a week ago, when we received the letter to come down here, so I could identify them at a future time.

Q. Is this your writing on this first line?

A. No, sir.

Q. That is the information that Mr. Schnacke read in. That wasn't written by you? .

A. No, sir.

Q. So you can't state, can you, of your own knowledge, that that information was accurate, yourself?

A. Yes, sir, I can. I depend completely on what my men write there.

Q. Ever make a mistake?

A. We are human.

Q. That means you sometimes do, doesn't it?

A. I wouldn't say on a license. That is almost

(Testimony of Henry James Warren.)

our profession. That is something we hardly ever miss.

Q. What about the number of people?

A. Almost as accurate. [269]

Q. Do you ever make a mistake?

A. I don't think I have to answer that, do I?

Mr. Schnacke: We will stipulate that the witness is human.

Mr. Gladstein: Will you also stipulate——

The Court: Come on, get on with it.

Mr. Gladstein: ——that humans err?

The Witness: Stick to the record there.

Mr. Gladstein: Will Your Honor pardon me a moment?

Mr. Gladstein: Q. Now, on the 20th of August, sir, how many inspectors—. Is that your title, Inspector? A. Yes.

Q. How many inspectors other than yourself were on duty at that station?

A. Usually, two. Sometimes three to a shift, and we work around the clock.

Q. Can you tell us, if you remember, how many of you were on duty between 3:30 p.m. and 4:20 p.m. that day? A. Yes, sir.

Q. How many?

A. Two, sir. Possibly three. I work an overlapping period in there sometimes during the heavy hours. But at the moment I would say there were just two on duty when that car went through.

Q. On this particular sheet that Mr. Schnacke asked you [270] about, is that sheet kept by one of

(Testimony of Henry James Warren.)

you or both of you, if there are three on duty, do all three write on the same document? A. Yes, sir.

Q. You all do? A. Yes, sir.

Q. You have it located in some central place, is that right?

A. Yes. It is on a clip board that sets on the table and cars coming in stop beside the table.

Q. Is there a tabulation here of the number of cars that passed through that station that day?

A. Not on there, but we do it 50 cars to a page.

Q. I see. You count the number of pages and that would tell you, is that right? A. Yes, sir.

Q. Take a look at that and see. Am I correct in saying that the last page is numbered 17, and it seems to be full, so you would take 17 times 50 cars?

A. Yes. There is another page with five. Seventeen full pages and five additional.

Q. The total number of cars that day would be 17 times 50 plus five? A. Yes, sir.

Q. Just another question, sir: That station that you were at is located on what highway? [271]

A. 97, sir.

Q. Is that a national highway?

A. California. Ties into the national highway.

Q. Well, I am just trying, if you will help me—I don't know the exact terms. Is it an important highway, one of the main highways?

A. Yes, sir.

Mr. Gladstein: That is all.

(Testimony of Henry James Warren.)

Redirect Examination

Mr. Schnacke: Q. What are the principal cities to the north and south of Dorris on that highway?

A. Directly above the station going north is Klamath Falls, Oregon, which eventually leads on—you can go into Washington, Oregon, or branch off to Montana and Idaho.

Q. And to the south?

A. Leads back into Weed to Highway 99 and then becomes Highway 99.

Q. So Dorris is between Klamath Falls and Weed, generally? A. Yes, sir.

Mr. Schnacke: That is all.

(Witness excused.)

Mr. Schnacke: Mr. Smith. [272]

FRANK J. SMITH

was called as a witness on behalf of the Government, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Q. Please state your name to the Court and to the Jury?

A. Frank J. Smith.

Direct Examination

Mr. Schnacke: Q. Mr. Smith, what is your occupation?

A. I am a special agent for the Federal Bureau of Investigation.

Q. And to what office are you assigned?

(Testimony of Frank J. Smith.)

A. The New York Office.

Q. How long have you been assigned to the New York Office? A. Eight years.

Q. And how long have you been a member of the FBI? A. Thirteen years.

Q. And on August 27 of last year were you in the vicinity of Twain Harte, California?

A. Yes, sir, I was.

Q. Did you participate in the arrests that were made at the cabin on that date?

A. Yes, I did.

Q. Are you acquainted with a Robert G. Thompson? [273] A. Yes, I am.

Q. For how long have you known him?

A. Oh, I have known Robert Thompson from about 1949 to this date—to the present.

Q. I will show you Government's Exhibit 2 and ask you if that picture represents Robert Thompson as you have seen him on any occasion?

A. Yes, this is the way Thompson appeared on August 27, 1953, at the time I arrested him.

Q. Is that the way he appeared in 1949 when you saw him? A. No, not at all.

Q. How did he look in 1949?

A. Well, he had dark brown hair and he had his hair—wore his hair much longer. He had a crew cut in this picture there at the time we arrested him. His hair was dyed red. He had a mustache, had a reddish mustache, and his eyebrows were red. His complexion was a brown. When I knew him in the past he had an apparently sallow complexion.

(Testimony of Frank J. Smith.)

He wasn't the color he was at the time we saw him.

He weighed about 41 pounds heavier on August 27, 1953, than he had when I saw him prior to that, which was about May 1st, 1951. He had a definite stomach, quite a large stomach, which he didn't have before. He was a husky built fellow, but he was quite fat in this picture here.

Q. Now, you say the last time you saw him prior to August [274] 27, 1953, was in May 1951, is that right? A. That is right, May of 1951.

Q. Between May of 1951 and the time you first saw Robert Thompson, on how many occasions did you see him?

A. Oh, I must have seen Thompson several hundred times.

Q. Was that in connection with your employment?

A. Yes, that is right. I saw him at the Communist Party headquarters, and about the time of the trial in New York.

Q. You were in attendance at that trial and observed him there? A. Yes, I did.

Q. What time did you arrive at the Twain Harte cabin on August 27, 1953? A. At 1:05 p.m.

Q. You arrived with the arresting party?

A. Yes, that is right.

Q. After your arrival, will you tell us what you did with respect to Robert Thompson or any of the defendants?

A. Well, after my arrival there, the agent in charge had announced that the fugitives were under

(Testimony of Frank J. Smith.)

arrest. The others were charged with harboring. I was directed——

Mr. Gladstein: (interposing) I object to that and ask the witness give his testimony, not in a conclusionary form, but in terms of what he said and heard and observed.

Mr. Schnacke: Q. Did you hear the agent in charge give [275] that announcement?

A. Yes, I did.

Q. What happened after that?

Mr. Gladstein: Just a moment. That is ambiguous. Make what statement? There were two statements the witness mentioned, if Your Honor please.

The Court: Well——

The Witness: A. I heard the agent in charge announce that the two fugitives were under arrest and that the others—and the fact that the other persons in the cabin were being charged with harboring the fugitives. [276]

Q. What did you observe or do thereafter?

A. I went to Thompson and asked him who he was, and he wouldn't talk to me. He wouldn't say anything. I knew Thompson and he knew me.

Mr. Gladstein: I am going to object to any conversations between this witness and Thompson. It is hearsay, no proper foundation laid, and it will be incompetent, irrelevant and immaterial.

The Court: The last answer may go out as the opinion and conclusion of the witness.

Mr. Schnacke: If Your Honor please, the first

(Testimony of Frank J. Smith.)

part of the last answer, the question made and the refusal to answer by Thompson may stay in?

The Court: I did not mean that part. The part of the answer in which he said Thompson knew him calls for a conclusion.

Mr. Schnacke: Q. What did you do thereafter?

A. I remained with Thompson. He was fingerprinted. At the time he was printed I was there with him. He denied his identity at that time. He still would not talk about who he was.

Mr. Gladstein: I am going to object to that and move that it be stricken unless the proper foundation is laid.

The Court: Have him state who was present and what the conversation was. [277]

Mr. Schnacke: Q. Who was present at the time he was being fingerprinted?

A. Roy Erickson, Agent Roy Erickson was there and I was there. They were the two ones that I recall immediately.

Q. Were there other agents present?

A. There were other agents there, yes.

Q. Where was this in the area?

A. Right immediately in front of the cabin.

Q. In the yard in front of the cabin?

A. In the yard, yes, in front of the cabin.

Q. Who spoke to Thompson and what if anything did Thompson say in reply at that time?

A. I spoke to Thompson—do you mean in connection with——

Q. At the time of the fingerprinting.

(Testimony of Frank J. Smith.)

A. Well, I spoke to him for one and asked him if he would sign the card, and he would not sign the card.

Q. Did he say something in response to your statement to him or to your request of him?

A. He either shook his head or indicated in the negative he would not sign it.

Q. Did he speak at all during the time that you were with him?

A. Not at the time at the cabin. On our trip back to San Francisco I talked to him.

Q. It was not until the trip back to San Francisco that you [278] heard him say anything?

A. Anything intelligent. He would shrug his shoulders. He would indicate he did not want to talk.

Q. After the fingerprinting what occurred between yourself and Mr. Thompson?

Mr. Gladstein: If Your Honor please, this is objectionable. It is not competent, relevant or material concerning these defendants.

The Court: You are referring now to what place? At the cabin?

Mr. Schnacke: Yes, Your Honor, at the cabin, immediately after the fingerprinting. I was asking him for the next actions that took place.

The Court: I will overrule the objection.

The Witness: A. After Thompson was fingerprinted he was photographed, and thereafter we prepared to go back to San Francisco. At the time of the arrest Thompson was dressed in a pair of

(Testimony of Frank J. Smith.)

Khaki pants. He had no shirt on, and he asked if he could have something to put on when it was apparent that he was going to be brought back to San Francisco. So I asked him where his clothes were, and one of the other agents,—Thompson told the agent that his clothes were up in the bedroom in the cabin, and one of the other agents, Agent McCann, went up to the room and brought down the suit Thompson had described. The first suit that he brought down Thompson said was not his. [279] However, a gray sport shirt that he had, Thompson admitted was his and he put the sport shirt on. The agent went back to the room and brought down a second suit, a cord suit, which Thompson admitted was his suit. He didn't put the suit on at the time, however. He carried it with him, went out, and got in the Bureau cars and came back to San Francisco.

Mr. Schnacke: Q. Did you examine that suit?

A. Yes, I did.

Q. Did you find anything in that suit?

Mr. Gladstein: May we have the time and place established of the examination and the persons present?

Mr. Schnacke: Q. Where was it that you examined this, Mr. Smith?

A. The suit was examined right at the cabin as he brought it down.

Q. Was that outside the cabin?

A. No, inside the cabin before I came out with him. Immediately when the suit was brought down it was examined to see if anything was in the suit.

(Testimony of Frank J. Smith.)

Q. I will show you a document and ask you if you have ever seen that before, and if so when and where?

A. Yes, I have. I first saw this document on August 27th and it was a certification of birth. It was in Thompson's coat. It was in the coat I just described, in the suit that we brought downstairs that he said was his. [280]

Mr. Schnacke: I will offer that document in evidence as Government's exhibit next in order.

Mr. Gladstein: If Your Honor please, I object to this upon the ground it is not binding upon any of these defendants. There is no proper foundation laid for introducing it against these defendants.

The Court: If it relates to the identity of the person named in the indictment——

Mr. Gladstein: Not as defendant.

Mr. Schnacke: A co-conspirator, Your Honor.

Mr. Gladstein: Maybe so.

Mr. Schnacke: There is ample evidence as of this time to justify the admission of this document in the opinion of the Government.

Mr. Gladstein: I trust my objection. I do not think the proper foundation has been laid to show any connection with these defendants.

The Court: Overruled. It may be admitted.

(Whereupon the document referred to above was thereupon received in evidence and marked Government's Exhibit 93.)

Mr. Schnacke: If Your Honor please, on Government's Exhibit 93 there is a stamp on the reverse

(Testimony of Frank J. Smith.)

indicating the circumstances under which this document has previously been used, and it is clear that that stamp was not on the document at the time it was obtained by Agent Smith. It is a court stamp.

The Court: Very well. It is not a part of the exhibit.

Mr. Schnacke: It is not part of the exhibit.

Mr. Schnacke: Q. Mr. Smith, I will show you a booklet and ask you if you have ever seen that booklet before and if so when and where?

A. Yes, I have seen this booklet on August 27th, 1953, at the cabin at Twain Harte.

Q. Where?

A. It was in the pocket of Thompson's suit, the suit that he identified as his.

Q. Was that in the same pocket as the document you described as Exhibit 93? A. Yes, it was.

Mr. Schnacke: I will offer that book in evidence as Government's Exhibit next in order.

Mr. Gladstein: Same objection, Your Honor.

The Court: Overruled. It may be admitted.

(Whereupon the booklet referred to was thereupon received in evidence and marked Government's Exhibit 94.)

Mr. Schnacke: If Your Honor please, I would like to identify these documents to the jury, if I may. Government's Exhibit No. 93, a document that says "Department of Health, [282] Bureau of Records and Statistics, City of New York, Certification of Birth. This is to certify that John Francis Brennan, sex male, was born in the City of New

(Testimony of Frank J. Smith.)

York on April 9th, 1909, according to birth record No. 19453, filed in the Manhattan office of this Bureau on April 21, 1909. In witness whereof, and so forth," and the signature of the registrar and the deputy. Apparently they are appended signatures.

And the text on the reverse recites certain provisions of the administrative code of the City of New York. The matter appearing in the upper right-hand corner of the reverse side was not part of the document at the time it was obtained by this witness.

Government's Exhibit 94 is a book. It contains a stamp, initiation stamp, \$100, with a rubber stamp marked over it, "September 1, 1951." It reads, "This is to certify in consideration of initiation fee of \$100, duly paid, Local Union No. 697, John F. Brennan, journeyman and worker, No. 470133, is hereby granted membership in the International Association of Bridge, Structural and Ornamental Iron Workers, affiliated with the American Federation of Labor, by Local Union 697 of Roanoke, Virginia. September 1, 1951."

And there are signatures purporting to be the signatures of the president, financial secretary and the address of the secretary. It bears the initials of Mr. Smith in the lower left-hand corner. [283]

Inside are several pages with columns marked for monthly dues, assessments. Under monthly dues it says, "You must have stamp before end of month to receive death benefits." In the last column, "See that you get stamps every time you pay dues and as-

(Testimony of Frank J. Smith.)

sessments. Don't pay unless secretary attaches stamps paid for."

Starting in the middle of the second page there are stamps, monthly dues stamps, which are in green, and death benefit stamps, which are in pink. Those stamps are over-stamped with a rubber stamp. The first two September 10th, 1951, the second stamp is September 10th, 1951, the green stamp. I can read 10/51 on the red stamp there but I can't read the month preceding it.

And then October 10th, 1951, on the next row of stamps, October 10th, 1951 on the next row of stamps, October 1951 on all of the stamps in the first five rows on the second page containing stamps.

May 30th, 1952, and also the date and number is stamped on the bottom row there. Then we find May 31st, 1952 stamps on the top half of the following page. October 24th, 1952 stamps on the bottom stamps on that page.

On the next page we have December 26 stamps imprinted over each of the stamps and on the page following that, containing just four stamps, a December 26th, 1952 stamp.

The balance of the book contains printed matter except [284] for the last page: Date of first initiation, a rubber stamp, September 1, 1951 in local Union No. 697.

Mr. Schnacke: Q. After the conversation about the coat to which you testified, did you conduct any further search of the person of Mr. Thompson or of the cabin at Twain Harte?

(Testimony of Frank J. Smith.)

A. I conducted no search of the cabin at Twain Harte, but I did conduct the search of Thompson's person. I naturally checked him at the time of the arrest, and he had a wallet in his back pocket, in the khaki pants he was wearing, a pen knife, car keys, handkerchief, and that was all he had.

Q. Did you examine the contents of the wallet?

A. Yes, sir, I did.

Q. I will show you a wallet and ask you if you have ever seen that wallet before, and if so when and where?

A. Yes, this is the wallet that I took from Thompson's back pocket.

Q. How do you identify that?

A. At the time I put by initials and date on it. I put it in the corner here (indicating).

Q. I will show you two keys. Can you identify those keys?

A. Yes, these are the keys that I took from Thompson's pocket. There again I put the date and my initials on the keys.

Q. Those keys were found in his pocket?

A. Yes, sir, that is right.

Q. Pants or coat pocket?

A. Pants pocket. [285]

Q. And the pants he was wearing at the time you arrested him?

A. Yes, that is right.

Mr. Schnacke: I will ask that the wallet described by the witness be received in evidence as Government's Exhibit next in order.

(Testimony of Frank J. Smith.)

Mr. Gladstein: Same objection, if Your Honor please.

The Court: Same ruling.

(The wallet referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 95.)

Mr. Schnacke: I will ask that the keys described by the witness be marked for identification at this time.

(The keys referred to above were thereupon marked Government's Exhibit No. 96 for identification only.)

Mr. Schnacke: Q. I will show you certain documents and ask you if you have seen those documents before, and if so when and where?

A. Yes, I have seen these documents before. These are documents that were in the wallet that I took from Thompson's pocket.

Q. They were not enclosed in those cellophane containers, were they?

A. No, they were not.

Mr. Schnacke: I will remove them from these. I will ask the documents described by the witness be received in evidence [286] as Government's exhibit next in order.

Mr. Gladstein: I make the same objection that the search was not authorized, no connection so far as the defendants were concerned, no foundation, incompetent, irrelevant and immaterial.

Mr. Schnacke: We will mark these as a single exhibit in the envelope.

(Testimony of Frank J. Smith.)

The Court: Admitted.

(Whereupon the documents referred to were thereupon received in evidence and marked Government's Exhibit No. 97.)

Mr. Schnacke: Q. Mr. Smith, did you find certain other matter in the wallet of Robert Thompson that we have not introduced in evidence here?

A. Yes, I did. There was a matter of \$363, I believe, and some odd cents in the wallet.

Mr. Schnacke: May I describe to the jury generally, the nature of the matter in Government's Exhibit No. 97?

"Rent received, D. and L. Brennan, Apartment 2S6915 Cornell Avenue, Leslie M. Price, Stoney Avenue address, phone DOrchester 3-8000." In the lower right-hand corner it reads, "Chicago, December 6, 1952."

There are three long papers reading at the lower left-hand corner, "American Bridge, Pittsburgh, Pa.," showing hours and earnings, deductions, employee's name, Brennan, John F., [287] the amounts of earnings and hours shown thereafter. There are three of those, each of them bearing the name John F. Brennan.

There is a card of Robbins Export Co., Inc., and written on it it says, "Give bearer whatever part he wants C.O.D." The signature, "Max."

On the reverse it says, "From authority directing 9:00 to 6:00 p.m.—" It looks like "Vet 17," and what appears to be a "D" or an "O," followed by a capital "S" and a small "t," and Mr. Smith's initials.

(Testimony of Frank J. Smith.)

A 1953 membership card of L. Brennan in the America National Red Cross, a contribution \$1.00.

A paper name John Brennan, city or town, Chicago, street address, Cook County. The description at the bottom—across the top April 24th, 1952, what appears to be the small letters K.C., the number 47566, and the number X2518917, a dollar sign, the number 1.00 followed by D.A.

And then "Associated Hospital Service, New York's Blue Cross Plan. John Brennan, 149 Vermilyea Avenue, New York City."

An employee courtesy card, Schenley Distillers Corporation. Introducing John Brennan. Firm, W. C. Williams Kirby, address 224 W. 49th Street, bearing apparently the signatures of V. V. King and the name of Mr. Shindler written in the lower left-hand corner.

The Social Security card 09-207-6833 for John Francis Brennan, containing what appears to be a signature, John Francis [288] Brennan.

The Social Security card, Linda Corsia Brennan, and bearing the apparent signature of Linda Corsia Brennan.

An official receipt, International receipt of Bridge, Structural and Ornamental Iron Workers, Local No. 697, September 26th, 1952, received of J. Brennan one—fifty written out, dollars for credit toward September dues. Received by, and a signature.

A social security account, John Francis Brennan, Apartment 41, 149 Vermilyea Avenue, New York, New York, 09-207-6833.

(Testimony of Frank J. Smith.)

A Missouri resident's fishing permit, name J. F. Brennan, address 5307 Pershing, St. Louis, age 44, blond hair, hazel eyes, height 5-11, date issued May 31, 1953, bearing the apparent signature of J. F. Brennan, the apparent signature of E. J. Chambers.

Then a card, a photostatic copy of a document, the top line April 24th, 1952, and a series of other numbers, what appears to be one dollar, and under that, name, John F. Brennan, a code number, 13655, Street, 6915 Cornell, Chicago 49, Cook County. A description, signature John Brennan, the bottom line, then driver's license will expire April 30th, 1955, State of Illinois, Edward J. Barrett, Secretary of State.

Operator's license, 1951, Pennsylvania Department of Revenue, made out to John F. Brennan, Majestic Hotel, Broad Street and Girerd Avenue, Philadelphia, Pennsylvania. [289]

And the Jackson Park Currency Exchange, Incorporated, money order receipt in the amount of \$30, dated May 27th, 1952.

Mr. Schnacke: Q. Mr. Smith, did you find on Mr. Thompson's person or in his wallet any material in the name of Robert G. Thompson?

A. No, I did not. There was nothing in his wallet or on his person with the name Robert G. Thompson at all.

Q. Did you have a conversation with Mr. Thompson about his wallet at a later time?

A. Yes, I did.

Q. When and where was that?

(Testimony of Frank J. Smith.)

A. When we were back in the San Francisco office.

Q. Who was present at that time?

A. Special Agent Richardson, Thompson and myself.

Q. What was the nature of that conversation?

Mr. Gladstein: I object to that as hearsay, not binding on any of the defendants, incompetent, irrelevant and immaterial.

The Court: There is one conspiracy charge in which he is named as a co-conspirator.

Mr. Schnacke: Yes, Your Honor.

The Court: The circumstances may permit it. It depends upon the state of the record at the time. I will overrule the objection. If it appears that the Court has committed some grievous error in that, it can later be stricken.

The Witness: What was your question? [290]

(Record read.)

The Witness: A. I attempted——

The Court: Don't say what you attempted to do. Just say what was said.

The Witness: A. I asked Thompson about where he had been and if he knew where the other Communist fugitives were at the present time.

Mr. Gladstein: I am going to move to strike that and renew my objection, if Your Honor please.

The Court: I will deny the motion.

The Witness: A. Thompson would not answer me, but I then went to him—took the wallet out in front of them and started to go through the various

(Testimony of Frank J. Smith.)

material that was in the wallet, and in his presence asked him if it was his, and he said it was his wallet, and these were his papers that were in the wallet. I went over each item in the wallet with him, and I made specific mention of the fact that everything was in the name of John Francis Brennan, and I recall I did ask him who John Francis Brennan was, and he smiled at me and made no comment. He wouldn't tell me who he was. I made a listing of the documents——

The Court: He is going beyond the question.

Mr. Schnacke: Q. That was the end of the conversation? A. Right.

Q. Did you prepare a receipt or a listing of the documents [291] in the wallet?

A. Yes, I did. I prepared—I made a listing of the documents as I reviewed them with him. He would not sign a receipt for those. He made no comment about it. But I also prepared a listing of the money that I took from the wallet, and at first I showed it to him and he agreed it was correct, and at first he wouldn't sign this either. However, just prior to the time that he was taken, to be brought to jail, he said, "Well, I guess you know who I am," and he said, "I will sign it." So in my presence he signed his name, Robert Thompson, and the listing of the money I had taken from him and the wallet and the penknife.

Q. Is this the listing to which you have referred? A. Yes, sir, it is.

(Testimony of Frank J. Smith.)

Q. Does the signature of Robert Thompson appear on that?

A. Yes, it does. It appears directly above mine.

Q. There is some rubber stamp matter in the upper right-hand corner that was not on the document at the time you received it from Mr. Thompson?

A. No, sir.

Mr. Schnacke: I will ask that that document be received in evidence as Government's exhibit next in order.

Mr. Gladstein: I object to it as hearsay, incompetent, irrelevant and immaterial, and not binding on any of the defendants, no connection shown, no proper foundation. [292]

The Court: In my opinion the record is in sufficient shape to warrant the introduction of this document at this time as to its admissibility. It may be admitted.

(Whereupon the document referred to was thereupon received in evidence and marked Government's Exhibit No. 98.)

Mr. Schnacke: No further questions, Mr. Smith.

Mr. Gladstein: Does Your Honor want to take the morning recess before I proceed?

The Court: We will take our usual mid-morning recess at this time.

(Recess.) [293]

Cross Examination

Mr. Gladstein: Q: Mr. Smith, what time did

(Testimony of Frank J. Smith.)

you say you went to the house there at Twain Harte? A. 1:05 p.m.

Q. Did you come from San Francisco?

A. Yes, sir, that's right.

Q. When did you leave San Francisco?

A. On September 26th. Pardon me, August 26th.

Q. At what time?

A. I believe it was around four o'clock in the afternoon.

Q. And you went toward Twain Harte?

A. Pardon?

Q. And went up toward Twain Harte?

A. Yes, that is right.

Q. When did you arrive at Twain Harte?

A. I believe it was around 9:30.

Q. At night? A. Yes.

Q. Did you go to the house at all before 1:05 next day? A. No, sir, I didn't.

Q. Were you alone or with others?

A. Pardon?

Q. Were you alone or with others?

A. I was with various other agents.

Q. Was Mr. McCann with you at any time?

A. Yes, sir, he was.

Q. During what period was he with you?

A. You mean immediately prior——

Q. To the arrest.

A. ——to the arrest?

Q. That day or next day.

A. Agent McCann was with me on the 26th, and

(Testimony of Frank J. Smith.)

immediately prior to the arrest on the 27th—or at the time of the arrest, I should say, on the 27th.

Q. That is James McCann?

A. No, Joseph. Joseph Patrick.

Q. There are two McCanns who were there?

A. No. The McCann I was speaking of is Joseph McCann.

Q. Is that the—I may have the first name wrong. Is that Joseph McCann that testified here? I was wrong. I am told his first name is Joseph and he has already testified in this case. You might not know that.

A. Yes.

Q. Was Mr. McCann with you during the early morning hours of the 27th, say, any time between daybreak and one o'clock in the afternoon?

A. Not in the early morning hours. He was with me at the time of the arrests at 1:05.

Q. Did you have the house under surveillance at any point before 1:05? [295]

A. I did not.

Q. Or the occupants of the house?

A. I did not.

Q. When you talked with Thompson, did you have a warrant for his arrest?

A. I did not have a warrant with me at the time. I advised him there was a warrant——

Q. No—— A. ——outstanding.

Q. I just asked if you had one. You didn't have one? A. I did not have it with me.

Q. Did you ever have a warrant for his arrest?

(Testimony of Frank J. Smith.)

A. There is a warrant outstanding for Thompson.

Q. No, I asked you if you ever had a warrant for his arrest.

The Court: He means you personally, in your possession.

A. I personally did not have it in my possession.

Mr. Gladstein: Q. Did you ever have it in your possession? A. No, sir.

Q. What?

A. I never had it in my possession, no.

Q. When did you leave New York to come here to Twain Harte?

Mr. Schnacke: Oh, if Your Honor please, I think that is going back much too far. I object to that as being immaterial and not within the scope of the direct examination.

Mr. Gladstein: I think it is within the proper scope of [296] cross examination. How far back it goes I can't know.

The Court: Well, that is a little too far back. Anything that reasonably bears on the factual matters that the witness has testified to is within the bounds of cross examination, but when the man left New York—oh, it might be possible the Court might allow it in its discretion if it appeared there was some question whether the man was ever here, or something of that kind, the testimony whether he left New York—

Mr. Gladstein: That is the purpose.

(Testimony of Frank J. Smith.)

The Court: But I think it is too far afield. Sustain the objection.

Q. Mr. Gladstein: Is it a fact you came from New York for the purpose of participating in the arrest of Thompson?

Mr. Schnacke: I object to that as being immaterial. The state of mind of the witness, his purpose in coming to Twain Harte, isn't material.

Mr. Gladstein: It isn't a question of the state of mind. Question of his instructions, not state of mind. What he was coming here to do.

The Court: I don't think it makes any difference what his purpose was.

Mr. Gladstein: Q. At the time you were at Twain Harte on the 27th of August, although you were there and had come from San Francisco the day before, you were still attached to the New York office of the Bureau, is that correct? [297]

A. Yes, sir, that is right.

Q. Did you personally have any difficulty in recognizing Thompson when you saw him?

A. I beg your pardon?

Q. Did you personally have any difficulty in recognizing Thompson when you saw him?

A. I personally did not because I had seen him on several hundred occasions, but his changed identity was very noticeable. As I say, I personally did not, although there was quite a change. If I hadn't seen him on so many occasions I probably would not have identified him.

(Testimony of Frank J. Smith.)

Mr. Gladstein: That is all. Oh, just a moment.

The Court: Anything else?

Mr. Schnacke: Is that all, Mr. Gladstein?

Mr. Gladstein: Just a second. I am constrained to ask Your Honor's indulgence to ask another question.

Q. Will you tell us when you received instructions to participate in the arrest of Thompson?

Mr. Schnacke: I object to that as being immaterial.

The Court: I will sustain the objection.

Mr. Gladstein: That is all.

Mr. Schnacke: Thank you, Mr. Smith. That is all.

(Witness excused.)

Mr. Schnacke: Mr. Ground. [298]

ALBERT B. GROUND

called as a witness on behalf of the Government, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name for the Court and jury.

A. Albert B. Ground—G-r-o-u-n-d.

Direct Examination

Mr. Schnacke: Q. Where do you reside, Mr. Ground?

A. 7411 Maple Avenue, Takoma Park, Maryland, a suburb of Washington, D. C.

(Testimony of Albert B. Ground.)

Q. By whom are you employed?

A. Federal Bureau of Investigation.

Q. What is the nature of your employment?

A. I am a fingerprint examiner. I classify, file, search and identify finger prints.

Q. For how long have you been so employed?

A. Thirty years.

Q. How many years? A. Thirty.

Q. Thirty? During the course of that time approximately how many fingerprints have you examined and classified?

A. Approximately 5,000,000.

Q. How many fingerprints are there in the files of the Federal Bureau of Investigation with which you work? A. Over 130,000,000. [299]

Q. And you have worked with fingerprints during the entire 30 years to which you have referred, is that right? A. Yes, sir.

Q. What is an inked fingerprint?

A. Inked fingerprint is the recording of the ridge formation of the bulb of the finger.

Q. And what is a latent fingerprint?

A. A latent fingerprint is one that is left at the scene of a crime, usually not discernible to the naked eye.

Mr. Gladstein: I am going to ask that that be stricken on the ground a portion of it is the conclusion and opinion of the witness.

The Court: Well——

Mr. Gladstein: Not a proper definition of a latent fingerprint.

(Testimony of Albert B. Ground.)

The Court: "At the scene of the crime", that may go out. I take it you mean a print left any place where a finger meets an object?

A. Yes, sir. The ridge formation leaves perspiration any place you touch. I have left my impressions on the microphone.

Mr. Schnacke: Q. Mr. Ground, I will show you Government's Exhibit No. 78 and ask you if you have ever seen that before? A. I have.

Q. And I will show you Government's Exhibit 92, which is ten Budweiser beer cans and ask if you have ever seen those [300] before?

A. I have.

Q. Are there inked fingerprints on Government's Exhibit 84?

A. That is this (indicating)?

Q. Yes. A. Yes, sir.

Q. And did you examine the beer cans in Government's Exhibit 92 to determine if there were latent fingerprints on that? A. I did.

Q. And did you find latent fingerprints on each of those cans?

Mr. Gladstein: Excuse me, I didn't hear the question.

The Court: "Did you find latent fingerprints on each of those cans?"

The Witness: I did.

Mr. Schnacke: Q. And did you compare the latent fingerprints found on the beer cans with the inked fingerprints found on the card, Government's Exhibit 84?

(Testimony of Albert B. Ground.)

Mr. Gladstein: One moment, sir. Objected to on the ground no proper foundation has been laid. We haven't had the witness tell us when and where and the circumstances under which this examination was made.

Mr. Schnacke: I asked if comparisons were made, and I will proceed after that to develop when and where they were made. Wouldn't that be the proper order?

The Witness: A. I did. [301]

Mr. Schnacke: Q. Where did you make that examination?

A. In my office at the Federal Bureau of Investigation, Washington, D. C.

Q. And do you recall when that was?

A. I received the cans on September 21st, 1953, and they were made within the following several days.

Q. You don't recall the exact date on which you made that comparison? A. No, sir.

Q. But it was some time within a period of a few days? A. Four or five days.

Q. Now, in making the comparison of the inked fingerprints and the latent fingerprints to which you have referred, what did you do?

A. I compared them—first, I photographed the latent impressions on the cans and from the photographs made my comparison with the inked fingerprints on the fingerprint card by using the fingerprint glass and comparing each fingerprint on the card with the latent impression on the can.

(Testimony of Albert B. Ground.)

Q. Did you find a fingerprint on any of the beer cans in Government's Exhibit 92 that corresponded to any of the fingerprints on the card, Government's Exhibit 84?

Mr. Schnacke: I beg your pardon, do I have the wrong exhibit number?

The Court: You are using the wrong one. You said 78 at [302] first.

Mr. Schnacke: It is Government's Exhibit No. 78.

The Witness: 78?

Mr. Schnacke: May the record show where I have previously spoken of Exhibit No. 84, which I think I have, I intended to say Exhibit 78.

The Court: Refer to it by name, too, and then there won't be any confusion.

Mr. Schnacke: Q. It is the fingerprint card of Shirley Kremen.

The Witness: A. That is correct. One latent fingerprint on can No. 4 was identified with the right thumb impression of Shirley Kremen. And one other latent impression on can No. 4 was identified as the left thumb print of Shirley Kremen.

One latent fingerprint on can No. 5 was identified as the right thumb impression of Shirley Kremen.

One latent fingerprint on can No. 6 was identified as the left thumb impression of Shirley Kremen.

Those are all that were identified as the fingerprints of Shirley Kremen.

Q. Would you hand me the cans on which you

(Testimony of Albert B. Ground.)

found fingerprints identical with the prints on the fingerprint card of Shirley Kremen?

Mr. Gladstein: I think that last question is assuming something not in evidence. The witness said he "identified". [303] Counsel said something about "identical".

Mr. Schnacke: I will withdraw that and use the phrase, that corresponded to the fingerprints of Shirley Kremen as they appeared on her card.

Mr. Gladstein: I think it would be better if Mr. Schnacke used the testimony rather than trying to change it.

The Witness: A. Here they are. This one, also.

Mr. Schnacke: Q. You have handed me three cans. Are those cans marked in any way so that you can identify them?

A. They have numbers on them, number 4, 5, and 6.

Q. And who put those numbers on there?

A. I put those numbers on there.

Q. That was after you received them in Washington, D. C.? A. Yes.

Q. The number to which you refer was put on the cellophane wrapping, is that correct?

A. That is correct, on the outside.

Q. Who wrapped those cans?

A. I did.

Q. When you received the cans, in what condition were they?

A. They didn't have the cellophane wrapping on the outside, I put the cellophane wrapping there.

(Testimony of Albert B. Ground.)

Q. Did they have the scotch tape?

A. Yes, the latent impressions were covered with scotch tape.

Mr. Gladstein: Well, I am going to object to that and move [304] that be stricken.

The Court: What?

Mr. Gladstein: About the latent impressions were covered by tape. He was asked whether the tape was present and he may say so.

The Court: Read the question and answer.

(Question and answer read by the reporter.)

The Court: I will deny the motion.

Mr. Schnacke: These cans are all in evidence, Your Honor, under one exhibit number, but I think with the marks on the can testified to by this witness it is unnecessary to designate them any further in the record other than to refer to the numbers that appear on the cellophane wrappers.

Mr. Schnacke: Q. Mr. Ground, have you ever seen fingerprints made by different people that were the same? A. No, sir.

Q. That is, in the examination of all the fingerprints you testified you have looked at in your career?

A. Not unless they were made by the same finger.

Q. And did you arrive at a conclusion as to the latent prints that you saw on these cans that are numbered 4, 5 and 6, and the prints that you observed on Shirley Kremen's fingerprint card?

A. Yes, sir. As I testified——

(Testimony of Albert B. Ground.)

Q. What was that conclusion? [305]

A. One fingerprint on can No. 4 was identified as the right thumb print. One other fingerprint on can No. 4 was identified as the left thumb print.

Q. By "identified" do you mean was identical with those prints as they appear on the fingerprint card?

A. Impressions, the impression on the cans and the impression on the fingerprint card.

One latent fingerprint on can No. 5 was identified as the right thumb print of Shirley Kremen.

One fingerprint on can No. 6 was identified as the right thumb print of Shirley Kremen. I beg your pardon, it is the left thumb print. The last one is the left thumb print.

Q. Mr. Ground, I will show you Government's Exhibit 81, which is the fingerprint card of Robert Thompson, and ask you if you made a comparison between the fingerprints appearing on that card and the latent fingerprints on any of the beer cans?

A. I did.

Q. And what did that comparison disclose to you?

A. One of the impressions appearing on can No. 5 was identified as the right ring fingerprint of Robert Thompson.

One fingerprint on can No. 6 was identified as the left ring fingerprint of Robert Thompson.

One latent fingerprint on can No. 10 was identified as the left little fingerprint of Robert Thompson.

(Testimony of Albert B. Ground.)

And three latent fingerprints on can No. 12 was identified, [306] one with the right middle, one with the right ring, and one with the left middle finger impression of Robert Thompson.

Mr. Gladstein: May I have that answer again?

Mr. Schnacke: Would you read it back?

(Answer read by the reporter.)

Mr. Schnacke: Q. When you say "was identified with", do you mean was identical to?

A. They were made by the same finger. The same finger made the impression on the fingerprint card as made the impression on the beer can.

Q. Did you find any other comparisons, or is that all of them with respect to Robert Thompson?

A. That is all with respect to Robert Thompson.

Q. I show you Government's Exhibit 84, the fingerprint card of Sidney Steinberg, and ask you if you made the same comparison of fingerprints on that card? A. I did.

Q. With the beer cans? A. I did.

Q. And what was the result of that comparison?

A. One latent fingerprint on can No. 8 was identified as the right index finger impression of Sidney Steinberg.

Two latent fingerprints on can No. 9 were identified as the finger impressions of Sidney Steinberg, one the right index, one the right middle finger impression. [307]

Q. And when you say "was identified with", that has the same meaning as the phrase had as you used it heretofore?

(Testimony of Albert B. Ground.)

A. That is correct. The same fingers made both impressions.

Q. Now, I will show you Government's Exhibit 80, the fingerprint card of Samuel Irving Coleman, and ask you if you made the same type of comparison with respect to the prints on that card?

A. I did.

Q. And what did that comparison disclose?

A. One latent finger impression on—I beg your pardon. Two latent finger impressions on can No. 3 were identified as the left thumb print of Samuel Coleman.

Q. And I will show you Government's Exhibit 79, the fingerprint card of Carl Ross, and ask you if you made the same type of comparison with respect to this one? A. I did.

Q. And what did that comparison disclose?

A. One latent fingerprint on can No. 11 was identified as the right middle fingerprint of Carl Ross.

One latent fingerprint on Budweiser can No. 8 was identified as the right index fingerprint of Carl Ross.

One additional latent impression on can No. 8 was identified as the right middle finger impression of Carl Ross.

Q. And I will show you Government's Exhibit 85, being the fingerprint card of the defendant Patricia Blau, and ask you if [308] you made the same comparison with respect to the fingerprints on that card? A. I did.

(Testimony of Albert B. Ground.)

Q. What did that comparison disclose?

A. One latent fingerprint on Budweiser can No. 7 was identified as the right index fingerprint of Patricia Blau.

Mr. Gladstein: Right what?

A. Index finger.

Mr. Schnacke: Q. And in each case where you said "were identified with", you mean that the same finger that made the impression on the card is the finger that made the impression on the beer can, is that correct? A. Yes, sir.

Q. Now, Mr. Ground, are you prepared to demonstrate how you made the comparison of the fingerprints on the *cans* and the fingerprints on the cans? A. Yes, sir.

Q. Did you photograph the fingerprints on the can? A. I did.

Q. And did you photograph the fingerprints on the card? A. I did.

Q. And did you put those photographs together in some fashion so that they could be compared, one with the other?

A. I made a chart, enlargement of one of each of those identifications, to illustrate the manner in which we arrived [309] at a conclusion as to the identity of those impressions.

Mr. Schnacke: With the permission of the Court, may the witness explain to the jury how he made one comparison for each of the defendants in this case?

(Testimony of Albert B. Ground.)

(Thereupon the witness left the stand and took a position before the jury box.)

The Witness: A. (Displaying exhibit to the jury). The finger impression on the left is the inked, or enlargement of the inked finger impression on the fingerprint card for Samuel Coleman.

The latent impression on the right is one of the finger impressions appearing on can No. 3. There is also a comparison set out here, and the points of similarity are described, a line drawn from each characteristics — ending ridges, bifurcations, short ridges, and islands or enclosures considered as means of identity or comparison between one impression and another.

The points of similarity, you will see, are in exactly the same place on the latent impression enlargement as on the inked enlargement. Same general area, same spot, and the same distance. Same number of ridges between each and every point of similarity.

Point No. 1 on chart C, which is the inked impression of the left thumb print of Samuel Coleman, shows an ending ridge ending up here in the northwest corner of the chart. Immediately next to that, one ridge intervening, is point 12—next to each other. I have shown the ridge of point 1 to the right, and [310] drop down three ridges, the ridge running to the left stops at that point.

Same thing on the other side on this chart. Point 1, ending ridge, goes over, point 12. Follow

(Testimony of Albert B. Ground.)

the ridge up this point 1, 2, 3 ridges down and find a point 1.

Immediately to the right of that, another ending ridge going to the left is point 3. Same thing occurs in both charts. Following down to the center of the chart, a ridge going to the left and stopping immediately above the center where you will find an ending ridge going left.

Same thing occurs in both charts. Just to the right a bifurcation going down. A bifurcation is a fork-like, like a fork in a road.

One ridge running down, opening into two ridges. That occurs at this point. Same thing, identical, occurs in the exact place on chart C.

To the right, one, two ridges over, is another ending ridge going upward. Just one ridge intervening. Downward from point 5, point 6, and across to point 7—one, two, three ridges intervening. That is a downward bifurcation.

And over to the left is a short ridge from the center of the pattern, coming down to the right, breaks down and drops at that point or stops. Same thing occurs in this chart. Comes down and stops.

Another two end ridges haven't been shown. They are [311] additional points of similarity that appear on each chart. To the left of the center and down in this manner, connecting at No. 9, which is an ending ridge, downward to the left of center in the pattern area.

Over to the left we find similar bifurcations or branches going downward to the left. It is point 10.

(Testimony of Albert B. Ground.)

Just above that there is another ridge over to the left, is point 11. Ending ridge going downward, appearing in exactly the same place on both charts.

I say in exactly the same place. There is an allowance must be made that that may be, oh, a quarter—one eighth or a quarter inch off, but in exactly the same spot. That is due to the photography and the curvature of the can. When you photograph around the edge of the can it brings it over over to the right, then when it is flattened out it is a little off to one side, maybe a quarter inch. However, the characteristics are exactly the same place and the same number of ridges between each and every characteristic. [312]

Mr. Schnacke: May the two photographs which the witness has referred to be marked Government's exhibit next in order?

Mr. Gladstein: Is that for identification?

Mr. Schnacke: In evidence.

Mr. Gladstein: I do not think the proper foundation has been laid for the reception in evidence. They were used for illustrative purposes. I think they should properly be identified. I want to object to their being received in evidence.

Mr. Schnacke: The fingerprints are in evidence and these are photographs of the fingerprints.

The Court: They are explanatory of the witness' testimony. They may be admitted.

(The photographs referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 99.)

(Testimony of Albert B. Ground.)

Mr. Schnacke: Q. You have handed me two more photographs. Will you tell me what these photographs represent?

A. Those are enlargements I believe of Sidney Steinberg's. It is marked on the outside.

Q. The photograph on the right is what?

A. On the right is the latent impression on can No. 9, one of the latent impressions on can No. 9.

Q. On the left is what?

A. On the left is the right index fingerprint of Sidney [313] Steinberg, an enlargement of the right index fingerprint of Sidney Steinberg, on the fingerprint card of Sidney Steinberg.

Mr. Schnacke: I will offer those two photographs in evidence as Government's Exhibit next in order.

The Court: Admitted.

Mr. Leonard: I make the same objection to this new offer as Mr. Gladstein made to the last one. I think it is preferable that the exhibit be in evidence prior to the time the witness explained it to the jury rather than putting it in afterwards.

The Court: Well, can't you shorten the testimony?

Mr. Schnacke: Suppose we put each of these in. We will allow the jury to look at them, and I will ask the witness to explain only one more of the photographs.

Mr. Gladstein: I am going to object to putting them in evidence. No proper foundation has been laid, and I will object to them severally and in

Testimony of Albert B. Ground.)

quantity, if, as I understand, they are going to be offered in quantity.

Moreover, if I may say so, if the Court please, this kind of testimony is opinion and conclusion testimony, and I want to make the objection that the witness has not been qualified by the testimony here today with a proper foundation to give his opinion and conclusion. If Your Honor overrules that objection I ask that the jury be instructed that this [314] is opinion testimony rather than fact testimony.

The Court: I do not know what distinction I can make to the jury in that regard. Probably 100 times I have heard fingerprint testimony presented in courts before a jury. I do not know how differently to do it. Of course it is opinion testimony. It is not necessary to put the detail in. The witness has given his opinion and explained how he did it. You seem to want to put the details in. It is always open for cross examination, of course.

Mark all of them for identification so you will have them in, and then you may proceed to ask what further questions you wish.

(The photographs referred to were thereupon marked Government's Exhibit No. 100 for identification.)

Mr. Schnacke: Q. What are the next photographs you are handing me, sir?

A. The chart marked K and L are enlargements of right middle finger impression of Thompson and one of the latent impressions on can No. 12.

(Testimony of Albert B. Ground.)

Mr. Schnacke: I will ask that the photographs just identified by the witness be marked Government's Exhibit next in order for identification.

(The photographs referred to were thereupon marked Government's Exhibit No. 101 for [315] identification.)

The Witness: The next chart is chart E and F. E is number 3 fingerprint impression, the right middle finger impression of Carl Ross, and one of the latent impressions on can No. 8.

Mr. Schnacke: I will ask that that group be marked Government's Exhibit next in order for identification.

Mr. Gladstein: I do not like to interrupt the tempo, Your Honor, but I did not get a chance to look at them. Counsel has advised me he does not have copies of them.

The Court: They are only being marked for identification now.

(The photographs referred to were thereupon marked Government's Exhibit No. 102 for identification.)

The Witness: Exhibit G and H, Exhibit I and J is an enlargement of the right thumbprint of Shirley Kremen, and one of the latent impressions on can No. 5.

Mr. Schnacke: I will ask that that be marked for identification as Government's next in order.

(Thereupon group of photographs referred to above were marked Government's Exhibit No. 103 for identification.)

(Testimony of Albert B. Ground.)

The Witness: Exhibits G and H are, or rather enlargements G and H, G is an enlargement of the right index finger [316] impression of Patricia Blau and the latent impression on can No. 7.

Mr. Schnacke: I will ask that the Patricia Blau prints be marked for identification with the Government's number next in order.

(Thereupon group of photographs referred to was marked Government's Exhibit No. 104 for identification.)

Mr. Schnacke: I would like, if Your Honor please, to have the witness explain the similarities in the last one as a further example of his method of comparison.

Q. Will you explain to the ladies and gentlemen of the jury the items of similarity that you discovered on those?

The Court: To what is he referring? You said the last one but you did not identify it.

Mr. Schnacke: I am referring to the photographs of fingerprints of Patricia Blau, Government's Exhibit No. 104.

The Witness: Chart G is an enlargement of the right index finger impression appearing on the fingerprint chart of Patricia Blau. H is an enlargement of the latent impression appearing on can No. 7. The similarity or the same points of similarity appear as your ending ridges, bifurcations, short ridges and enclosures or islands.

Point No. 1 is an ending ridge going up at this point right here (indicating), and drops down to

(Testimony of Albert B. Ground.)

Point 12 again, [317] because it is immediately adjacent to Point No. 1. It is to the right, down just a little.

The same thing occurs on Chart No. H, which is the latent impression No. 1 and No. 12. The ridges go upward and ending, one adjacent to the other.

Going over from Point No. 1 to the right, another ending ridge is Point No. 2, one, two, three, four ridges over, ending going forward.

Point No. 3, down to the right, the next ridge over, is Point No. 3, the very next ridge over.

And then one ridge inside and to the right, Point No. 4, those are all ending ridges going to the left and stopping right where the point is marked.

Point No. 5, two ridges down from Point No. 4, two ridges, the ridge going down to the right—rather than upward, it is going downward. The same thing occurs on Chart G as on Chart H. Down to the left, the ridge coming downward.

Point No. 6, four ridges over, on each chart, Point No. 6. To the left, one, two, ridges, there is a triangular formation at the delta—known to the fingerprint men as a delta formation, taken from the Greek letter “D”—a triangle right here. That is Point 7.

Point 8, Point 9, three parts of the triangle, the same thing occurs on Chart H as on Chart G. [319]

To the right is Point 10, a bifurcation coming downward just to the left of that. One ridge over is Point No. 11.

Point No. 12 I have already explained, which is

(Testimony of Albert B. Ground.)

two ridges over from Point No. 11. All points are in a similar location on each chart.

Q. Will you tell me, sir, how many points of identity are necessary to establish the identity of fingerprints?

Mr. Gladstein: That calls for a conclusion, if Your Honor please, what is necessary.

The Court: He is testifying as an expert, an opinion witness. Overruled.

A. That would depend upon the impressions themselves. I would have to see the impression to determine how many points of similarity. Certain characteristics appear in impressions. Sometimes there are more in one than in another. We may take a square inch of one impression, that is, of one finger. You may find 12 or 15 points of similarity or points of identity in that square inch. On another fingerprint impression you may not find but two or three in that same area. So it would depend upon the type of characteristics, how many appear in a certain area, but as a standard we have set out 12. Some of the older technicians, who were pioneers in fingerprinting had established years ago that 12 were a sufficient number. Some say 6, some say 10, 9, and so forth. But we arrive at the opinion that 12 would [320] be satisfactory, 12 points of similarity with no dissimilarities which cannot be explained.

Q. Did you find 12 points of similarities on each of the fingerprint comparisons to which you testified?

(Testimony of Albert B. Ground.)

A. There are more than 12 points of similarity on each of the impressions which has been testified to.

Mr. Gladstein: I move to strike the last portion, if Your Honor please. He was asked if he found 12. The answer would be yes or no.

The Court: Overruled.

Mr. Schnacke: Q. Did you find any unexplained points of dissimilarity in any comparisons that you made? A. No, sir.

Mr. Schnacke: No further questions.

The Court: I think we perhaps should take the noon recess now.

Members of the jury, no doubt some members of the jury and perhaps other parties interested in this case may wish to engage in some observance of Good Friday tomorrow, and so when we assemble tomorrow, we will assemble at the usual time, 10 o'clock in the morning, but at 11:30 we will take a recess until 3 o'clock so as to give those who are so inclined an opportunity to engage in Good Friday observance.

We will reconvene now at 2 o'clock this afternoon.

(Thereupon a recess was taken to the hour of 2 o'clock p.m. this date.) [321]

ALBERT B. GROUND

resumed the stand, previously sworn.

Cross Examination

Mr. Gladstein: Q. Mr. Ground, I believe you said that you examined some 5,000,000 fingerprints during the course of your 30 years in this business.

A. Yes, sir.

Q. And I suppose it is on that experience that you have told this jury that fingerprints of two different people are never exactly the same?

A. That is correct.

Q. Every person has fingerprints that, in one respect or another, differ from the fingerprints of some other person? A. That is right.

Q. At the same time, there are points or degrees of similarity between the fingerprints of myself and yourself, perhaps, isn't that so?

A. Yes, sir.

Q. What would you say, based on your experience, would be the possible number of points of similarity that might be found, say, in the index finger of my right hand, print of that, and yours?

A. The number of points of similarity? [322]

Q. Yes.

A. The characteristics used, there are only four characteristics used as I stated heretofore, end ridges, bifercations, short ridges and enclosures or islands. Those may appear, but they won't appear in exactly the same place.

Q. But my question was this: Any finger—my finger—let's take that as an example—would have

(Testimony of Albert B. Ground.)

ending ridges that would print just as yours would?

A. Correct.

Q. And would have bifurgations as well as yours? A. Yes.

Q. It would show short ridges, too, wouldn't it?

A. Yes.

Q. And it would show these, what you call islands, isn't that right? A. Yes, sir.

Q. If you and I were, simply as a matter of experiment, to have a print taken, based on your experience how many points of similarity would it be possible for you to find between my print and yours?

A. I have no idea how many could possibly. I would have to see them.

Q. I beg your pardon?

A. I would have to see them together to determine, but I wouldn't have any idea how many possibilities. According to [323] the writers and the—some of the individuals who have written textbooks on fingerprints, the possibility of two fingerprints being the same is 1 followed by 60 digits. The number of characteristics.

Q. Yes, the number of characteristics, similarities.

A. There are only four possible characteristics. How many times they would appear between your finger and mine is impossible for me to determine without looking at both.

Q. Well, Mr. Ground, I realize that I don't have anything specific, but I am asking you, based on

(Testimony of Albert B. Ground.)

your own experience, isn't it so that you have found points of similarity—points of similarity between the fingerprints of different people?

A. Oh, yes.

Q. Yes. I am asking you now whether you can't give us some general idea—I am not asking about the similarity between your print and mine now as a matter of fact, but simply for the purpose of illustration, how many points of similarity do you think would be possible, and give us a range, to find between a print of mine and a print of yours taken from the same finger, the right index finger.

A. Oh, there may be several points of similarity.

Q. But how many?

A. But in addition there will be several points of dissimilarity.

Q. I will come to that in a moment. First, I am asking you [324] about points of similarity. Could there be as many as 20 or 30?

A. Oh, no, sir. Maybe two or three. Possibly two or three. Even four, possibly. In a general way it could be four.

Q. Not more than four?

A. Oh, there could be more than four. I wouldn't be able to say without examining the impressions.

Q. Could be as many as eleven points of similarity between your fingerprints and mine, couldn't there?

(Testimony of Albert B. Ground.)

A. Not without any dissimilarity there. Not in my experience.

Q. You have told us you as a rule look for twelve points of similarity, didn't you?

A. Yes, sir. That is standard. That doesn't necessarily mean there has to be twelve points of similarity in order to be made by the same person.

Q. Oh, no.

A. That would depend on the number of characteristics in the given area.

Q. When you talk about—. Let's take this. You understand, I am not a fingerprint expert, so if—

A. (Interposing) I am trying to help.

Q. I know you are, and you will help me more if you will go along with me and take it in one, two, three, simple ABC fashion, because this isn't a field in which I claim to be an expert. [325]

All I am trying to ask you now, if I put my finger here I will leave a print of some kind, won't I? A. Yes.

Q. And if you put the corresponding finger on your right hand—this happens to be the right index—you would leave a print?

A. Yes.

Q. Then if you photographed the two of those and enlarged it considerably so that you could examine them, probably under some microscope, you would find points of similarity between those prints, wouldn't you?

A. Yes, sir, possibly. Possibly. May not be.

(Testimony of Albert B. Ground.)

Q. Well, might the one or even two completely different types of fingerprints. But possibly there could be similarities? A. Yes, sir.

Q. And I am asking you now if it isn't so you might find as many as ten or eleven points of similarity between your print and my print?

A. I don't believe I would find eleven.

Q. Might find ten?

A. Possibly ten. Maybe eleven. Maybe even eleven points of similarity.

Q. And when you talk about points of similarity, would you try to tell us in a way we can clearly understand what you mean by a point of similarity? [326]

A. The characteristics, as I stated before, ending ridges in exactly the same place on both impressions. There will be, just like this street is named Jones Street here and the next is named Market Street, in order to be the same street, they would have to be in the same place on the map. That is the same thing with fingerprints. Same lines going a certain length and stop.

Q. That is the ending ridge?

A. That is the ending ridge, that is right. Could bifercate or diverge or converge at certain points. They separate. One ridge separate into two.

Q. Yes?

A. And that is what is known as bifurcation.

Q. All right.

A. Another point of similarity. Those will ap-

(Testimony of Albert B. Ground.)

pear exactly in the same place in each impression.

Q. And the short ridge is what?

A. Just like it says, a short ridge. Like a street that runs a block and no further.

Q. In other words, you find in the area that you are examining a line or ridge that seems to be short, isn't connected with some other line in the immediate vicinity?

A. That is correct.

Q. And an island, what is that?

A. That is just an enclosure. It is one ridge that separates [327] into two, then converges again or joins together and makes an island or enclosure.

Q. The term you have used today, "point of similarity", have you used it to indicate any one or more of these four things, that is, ending ridge, bifercation, short ridge and island?

A. Yes, sir.

Q. So that when you look at prints, it is correct, isn't it, that you just don't look to see whether the ending ridges seem to be the same, but you look for all four, don't you?

A. Correct.

Q. And so I take it from your answer, the answer you gave us a while ago when you said you didn't think you would find eleven points of similarity between, not necessarily my prints, but two sets of prints, two different people, but you might find ten, those different points of similarity would include such things as the ending ridges, bifercations, the short ridges and islands?

A. Yes, sir.

No. 14380

United States
Court of Appeals
for the Ninth Circuit

E. S. McKENDRY and PANCHO BARNES, also
known as Florence Lowe Barnes and as Florence
Lowe Barnes McKendry,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Northern Division

FILED

APR - 7 1955

PAUL P. O'BRIEN, CLERK

No. 14380

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E. S. McKENDRY and PANCHO BARNES, also
known as Florence Lowe Barnes and as Flor-
ence Lowe Barnes McKendry,

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Los Angeles 12, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.



In the United States District Court, Southern District of California, Northern Division

No. 1253-ND—Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

360 ACRES OF LAND IN THE COUNTY OF KERN, State of California; E. S. McKendry; Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry; William Emmert Barnes; Benjamin C. Hannam; Kathryn May Hannam; Florence Lowe Barnes, doing business as Pancho's Rancho Oro Verde; Desert Aero, Inc.; Layne & Bowler Corporation, a corporation; Farmers and Merchants Trust Company of Long Beach, a corporation; Farmers and Merchants Bank of Long Beach, a corporation; County of Kern, a body politic and corporate; State of California, a corporation sovereign, and Unknown Owners, Defendants.

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America at the request of the Assistant Secretary of the Air Force of the United States, for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat.

1421; 40 U.S.C., Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority [2] of the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C., Sec. 257); and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C., Sec. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C., 1343a, b, and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 28, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress); and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress), which act appropriated funds for such purposes.

3. The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for expanding needs and requirements for the Department of the Air Force and other military uses incident thereto.

4. The estate taken for said public uses is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is situate in the County of Kern, State of California, and, for con-

venience, is segregated into separate tracts designated by separate tract numbers and is more particularly described as follows:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management. [3]

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2071: Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

6. The names of the apparent and presumptive

owners of the said land are set out after each tract number as follows:

Tract L-2040: E. S. McKendry; Florence Lowe Barnes McKendry; Desert Aero, Inc. and Layne & Bowler Corporation.

Tract L-2043: William Emmert Barnes; Florence Lowe Barnes McKendry; Desert Aero, Inc. and Layne & Bowler Corporation.

Tract L-2071: Benjamin C. Hannam and Kathryn May Hannam; E. S. McKendry, also known as E. S. McKenndry, and Florence Lowe Barnes McKendry. [4]

Tract L-2072: E. S. McKendry; Florence Lowe Barnes McKendry; Desert Aero, Inc. and Layne & Bowler Corporation.

7. The State of California and the County of Kern may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named there are or may be others who have or may claim to have some interest in the property to be taken, whose names are unknown to plaintiff and such persons are made parties to this action under the designation "Unknown Owners".

Wherefore, plaintiff demands judgment that the property be condemned and that just compensation

for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Dated: February 27, 1953.

WALTER S. BINNS,
United States Attorney
A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice.

/s/ By A. WEYMANN,
Attorneys for Plaintiff.

Demand for Jury Trial

Trial by jury of the issues of just compensation is demanded by plaintiff.

Dated: February 27, 1953.

WALTER S. BINNS,
United States Attorney
A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice.

/s/ By A. WEYMANN,
Attorneys for Plaintiff. [5]

[Endorsed]: Filed Feb. 27, 1953.

[Title of District Court and Cause.]

DECLARATION OF TAKING

To the Honorable The United States District Court:

I, the undersigned, Edwin V. Huggins, Assistant Secretary of the Air Force of the United States of America, do hereby make the following declaration by direction of the Secretary of the Air Force:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C. 1343a, b and c), which [6] Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress), which act authorizes acquisition of the land, and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress), which act appropriated funds for such purposes.

(b) The public uses for which said lands are

taken are as follows: The said lands are necessary adequately to provide for expanding needs and requirements for the Department of the Air Force and other military uses incident thereto. The lands have been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with Edwards Air Force Base, Kern County, State of California, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the lands being taken is set forth in Schedule "A", attached hereto and made a part hereof, and is a description of part of the lands described in the Complaint in Condemnation filed in the above-entitled cause.

3. The estate taken for said public uses is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said lands, with all buildings and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said lands is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said lands probably will be within any limits prescribed by law on the price to be paid therefor. [7]

In witness whereof, the undersigned, the Assistant Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 3rd day of February, 1953, in the City of Washington, District of Columbia.

/s/ E. V. HUGGINS,

Ass't Secretary of the Air Force

SCHEDULE "A"

The land which is the subject matter of this Declaration of Taking aggregates 360.00 acres, more or less, situate and being in the County of Kern, State of California. A description of the lands taken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

Tract L-2040: The West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); the Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); the West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 140.00 acres, more or less.

Names and addresses of purported owners: E. S. McKendry, Box 37, Edwards, Calif. Florence Lowe Barnes McKendry, Box 37, Edwards, Calif. Desert Aero, Inc., c/o Bertrand Rhine, 729 Citizens Nat'l Bank Building, Los Angeles, Calif. Layne and Bow-

ler Corp., a Calif. Corporation, address unknown.

Estimated compensation: Thirty-Three Thousand Five Hundred Dollars (\$33,500.00).

Tract L-2043: The West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); the East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 100.00 acres, more or less. [9]

Names and addresses of purported owners: William Emmert Barnes, Box 37, Edwards, California. Florence Lowe Barnes McKendry, Box 37, Edwards, California. Desert Aero, Inc., c/o Bertrand Rhine, 729 Citizens Nat'l Bank Bldg., Los Angeles, California. Layne & Bowler, Box 8225, Market Station, Los Angeles, California.

Estimated compensation: Twenty-Nine Thousand Dollars (\$29,000.00).

Tract L-2071: The Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section 20, Township 9, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 40 acres, more or less.

Names and addresses of purported owners: Ben-

jamin C. Hannam and Kathryn May Hannam, Address unknown. E. S. McKendry, also known as E. S. McKenndry, Box 37, Edwards, California. Florence Lowe Barnes McKendry, Box 37, Edwards, California.

Estimated compensation: Two Thousand Dollars (\$2,000.00).

Tract L-2072: The East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management.

Containing 80.00 acres, more or less. [10]

Names and addresses of purported owners: E. S. McKendry, Box 37, Edwards, California. Florence Lowe Barnes McKendry, Box 37, Edwards, California. Desert Aero, Inc., c/o Bertrand Rhine, 729 Citizens Nat'l Bank Bldg., Los Angeles, California. Layne & Bowler, Box 8225, Market Station, Los Angeles, California.

Estimated compensation: One Hundred Forty Thousand Five Hundred Dollars (\$140,500.00).

The gross sum estimated to be the just compensation for the estates in the lands hereby taken is Two Hundred Five Thousand Dollars (\$205,000.00).

[Endorsed]: Filed Feb. 27, 1953.



[Title of District Court and Cause.]

DECREE ON DECLARATION
OF TAKING

There having been filed and presented to the Court by plaintiff, United States of America, a Declaration of Taking in which the fee simple title in and to the real property hereinafter described, was vested in plaintiff, and good cause appearing therefor, the Court finds and decrees as follows:

1. That plaintiff, United States of America, is entitled to acquire the property by eminent domain for use in connection with the Edwards Air Force Base, California, and for such other uses as may be authorized by Congress or by Executive Order.

2. That a Complaint in Condemnation was filed herein at the request of the Assistant Secretary of the Air Force, the authority empowered by law to acquire the land described in said Complaint, and under the direction of the Attorney General of the United States.

3. That in said Complaint in Condemnation and in the Declaration of Taking is a statement showing the authority under which this proceeding [13] was brought and a statement as to the public uses for which said land is being taken and the Assistant Secretary of the Air Force is the person duly authorized and empowered by law to acquire the said land and the Attorney General of the United States is the person authorized by law to direct the institution of this condemnation proceeding.

4. That a statement of the estate or interest in

said land is also shown in said Declaration of Taking, and drawings showing the land taken are attached to and made a part of said Declaration of Taking.

5. That a statement of the amount of money estimated by the Assistant Secretary of the Air Force to be just compensation for the taking of said land, namely, the sum of \$205,000, is shown by said Declaration of Taking, which sum has been deposited into the registry of this Court.

6. That in said Declaration of Taking is a statement to the effect that the estimated ultimate award of damages for the taking of said property, in the opinion of the Assistant Secretary of the Air Force probably will be within any limits prescribed by Congress as the price to be paid therefor and the Court having fully considered the Complaint in Condemnation and the Declaration of Taking and the statutes made and provided, is of the opinion that plaintiff, United States of America, is entitled to the full fee simple title to the estate hereby taken for the public uses in the land hereinafter described, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines.

7. That the said title is being acquired pursuant to and under the authority of the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C., Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C., Sec.

257); and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C., Sec. 171), which acts authorize [14] the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C., 1343a, b and c), which act authorizes the acquisition of land for air corps stations and depots; the National Security Act of 1947, approved July 26, 1947 (61 Stat. 495); the Act of Congress approved June 17, 1950 (Public Law 564, 81st Congress); and the Act of Congress approved September 6, 1950 (Public Law 759, 81st Congress), which act appropriated funds for such purposes; and acts amendatory thereof or supplementary thereto.

It is therefore ordered, adjudged and decreed:

I.

That there is hereby vested in plaintiff, United States of America, the full fee simple title to the estate herein taken for the public uses in the lands hereinafter described, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

II.

That the land taken and condemned in and by this proceeding is situate in the County of Kern, State of California, and is more particularly described as follows:

Tract L-2040: West Half (W $\frac{1}{2}$) of the North-

west Quarter (NW $\frac{1}{4}$); Northeast Quarter (NE $\frac{1}{4}$) of the Northwest Quarter (NW $\frac{1}{4}$); West Half (W $\frac{1}{2}$) of the Southeast Quarter (SE $\frac{1}{4}$) of the Northwest Quarter (NW $\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2043: West Half (W $\frac{1}{2}$) of the Northeast Quarter (NE $\frac{1}{4}$); East Half (E $\frac{1}{2}$) of the Southeast Quarter (SE $\frac{1}{4}$) of the Northwest Quarter (NW $\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2071: Northwest Quarter (NW $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half (E $\frac{1}{2}$) of the Northeast Quarter (NE $\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

III.

That nothing herein is to be considered as a determination by the Court that the estimate of the Assistant Secretary of the Air Force of the United States of the amount now on deposit, is or is not just compensation for the taking of the said land by plaintiff.

IV.

The Court reserves jurisdiction to enter such further orders and decrees as may be necessary and proper in the premises.

Dated: March 2, 1953.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

WALTER S. BINNS,
United States Attorney

A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice.

/s/ By A. WEYMANN,
Attorneys for Plaintiff. [16]

[Endorsed]: Filed March 2, 1953.

[Title of District Court and Cause.]

PETITION FOR PARTIAL DISTRIBUTION
OF COMPENSATION PURSUANT TO SEC-
TION 258a, TITLE 40, U.S.C.

(Tracts Nos. L-2040, L-2043
and L-2072)

To: The District Court of the United States, in and
for the Southern District of California, North-
ern Division:

The petition of E. S. McKendry, Florence Lowe

Barnes, also known as Pancho Barnes, and William Emmert Barnes, respectfully shows:

1. That they were, until the 27th day of February, 1953, the owners in fee simple of the hereinafter described property and entitled to the compensation to be paid therefor upon the condemnation and taking of said property by plaintiff in the above entitled action.

2. That on the 27th day of February, 1953, as your petitioners are informed and believe and therefore allege, plaintiff filed in this action its Declaration of Taking whereby it took and condemned the hereinafter described property, and simultaneously therewith deposited into the registry of the Court the estimated just compensation therefor.

3. That your petitioners are informed and believe and therefore [17] allege that the sum deposited into the registry of the Court as the estimated just compensation for the hereinafter described property is the sum of \$203,000.

4. That your petitioners are informed and believe and therefore allege that the sum of \$185,000 can now be paid out of the funds deposited into the registry of the Court for the hereinafter described property, without prejudice to the rights of plaintiff or of any other party to this proceeding.

5. That at the time title to the hereinafter described property vested in plaintiff by the filing of its Declaration of Taking as aforesaid, Tracts Nos. L-2043 and L-2072, as hereinafter described, were

subject to a Deed of Trust dated January 30, 1950, executed by William Emmert Barnes, a single man and one of the petitioners, to Farmers and Merchants Trust Company of Long Beach, as Trustee, to secure an indebtedness of \$13,000 in favor of Farmers and Merchants Bank of Long Beach, a corporation, and any other amounts payable under the terms thereof, recorded April 7, 1950 in Book 1558, page 371 of Official Records, and that by reason of the filing of plaintiff's Declaration of Taking aforesaid, the indebtedness secured by the aforesaid Trust Deed was transferred to the fund on deposit in the registry of the Court and is payable out of said fund.

6. That the property affected by this petition is located in the County of Kern, State of California, and is fully described as follows:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the

survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Wherefore, your petitioners severally voluntarily appear in this action and waive service of process and pray an order of Court as follows:

(a) Directing the Clerk of the Court to pay out of the funds on deposit in the registry of the Court as aforesaid, the sum of \$12,246.24 to Farmers and Merchants Bank of Long Beach, a corporation, in full satisfaction and discharge of the indebtedness secured by the aforesaid Deed of Trust executed by William Emmert Barnes to Farmers and Merchants Trust Company of Long Beach, as Trustee.

(b) Directing the Clerk of the Court to pay the balance of said sum of \$185,000, to-wit, the sum of \$172,753.76 to E. S. McKendry, as trustee for your petitioners, and said order may provide that said payment so made, together with the payment made to discharge the aforesaid obligation to Farmers and Merchants Bank of Long Beach, shall be credited to plaintiff on account of the compensation to be hereafter awarded by judgment to be entered in this proceeding, determining the compensation payable by plaintiff for the condemnation and taking of the aforesaid tracts of land. That by presenting this petition your petitioners covenant and agree, and the order to [19] be entered hereon shall so

provide, that plaintiff shall in no wise be responsible for the proper application or distribution of the moneys paid to said E. S. McKendry, pursuant to this petition.

Dated: March 10, 1953.

/s/ E. S. McKENDRY,

/s/ PANCHO BARNES,

Florence Lowe Barnes, also known
as Pancho Barnes

/s/ WILLIAM EMMERT BARNES

State of California,
County of Los Angeles—ss:

E. S. McKendry, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, and William Emmert Barnes, each being by me first duly sworn, upon oath depose and say: That they are defendants in the above entitled action and the petitioners who executed the above petition for partial distribution of compensation; that they have each read the foregoing petition and know the contents thereof; that the same is true of their own knowledge except as to matters which are therein stated upon information and belief and as to those matters that they believe it to be true.

/s/ E. S. McKENDRY

/s/ PANCHO BARNES,

Florence Lowe Barnes, also known
as Pancho Barnes.

/s/ WILLIAM EMMERT BARNES

Subscribed and sworn to before me this 10th day of March, 1953.

[Seal] /s/ VIOLET O. RYBURN

Notary Public in and for said County and State.

Granting of the foregoing Petition is hereby consented to.

WALTER S. BINNS,
United States Attorney

A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice.

/s/ By A. WEYMANN,
Attorneys for Plaintiff. [21]

[Endorsed]: Filed March 11, 1953.

[Title of District Court and Cause.]

ORDER ON PETITION FOR PARTIAL DISTRIBUTION OF COMPENSATION PURSUANT TO SECTION 258a, TITLE 40, USC.

(Tracts Nos. L-2040, L-2043 and L-2072)

There having been filed and presented to the Court the verified petition of E. S. McKendry, Florence Lowe Barnes, also known as Pancho Barnes, and William Emmert Barnes, from which it appears to the satisfaction of the Court that they were, until the filing of plaintiff's Declaration of Taking in the

above entitled action, the owners in fee simple of the hereinafter described property and entitled to the compensation to be paid for the condemnation and taking of said property, and

It further appearing from said petition that plaintiff has deposited into the registry of the Court with said Declaration of Taking, the sum of \$203,000 for the said property described in said petition and hereinafter particularly described, and that the sum of \$185,000 can now be paid out of said deposit to petitioners or for their benefit, without prejudice to the rights of plaintiff or any other parties to the proceeding, and good cause appearing therefor,

It is now ordered that the sum of \$12,246.24 be paid to Farmers and Merchants Bank of Long Beach, a corporation, in full satisfaction and discharge of that certain indebtedness secured by a Deed of Trust executed by William Emmert Barnes to Farmers and Merchants Trust Company of Long Beach, dated January 30, 1950 and recorded April 7, 1950, which indebtedness affected Tracts Nos. L-2043 and L-2072 as hereinafter described, and that there be paid the further sum of \$172,753.76 to E. S. McKendry, as trustee for the petitioners, on account of the compensation payable for the condemnation and taking of Tracts Nos. L-2040, L-2043 and L-2072, as hereinafter described, and

It is further ordered that the total sum of \$185,000 so paid be credited to plaintiff on account of any compensation to be hereafter awarded by a judgment entered in this proceeding, determining

the compensation payable by plaintiff for the condemnation and taking of the hereinafter described tracts of land, and

It is further ordered and adjudged that plaintiff shall not be liable for the proper application or distribution of the moneys paid to the said E. S. McKendry pursuant to this Order.

The property affected by this Order of Partial Distribution of Compensation is situate in the County of Kern, State of California, and is more particularly described as:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the offi-

cial plat of the survey of said land on file in the Bureau of Land Management.

Dated: March 11, 1953.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

WALTER S. BINNS,
United States Attorney

A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice.

/s/ By A. WEYMANN,
Attorneys for Plaintiff.

Approved as to form and substance:

/s/ E. S. McKENDRY,

/s/ PANCHO BARNES,

Florence Lowe Barnes, also known as
Pancho Barnes,

/s/ WILLIAM EMMERT BARNES

Petitioners. [24]

[Endorsed]: Filed March 11, 1953.

[Title of District Court and Cause.]

RECEIPT AND PARTIAL SATISFACTION

(Tracts Nos. L-2040, L-2043 and L-2072)

Receipt of United States District Court check
No. 18472 in the sum of \$172,753.76, payable to the

order of E. S. McKendry, Trustee, is hereby acknowledged.

Payment of said sum of \$172,753.76 is received on account of the just compensation payable for the condemnation and taking of property in the above captioned proceeding, which property is particularly described in that certain Order of the United States District Court dated March 11, 1953, in the above entitled action.

Dated: March 13, 1953.

/s/ E. S. McKENDRY,
as Trustee.

Witness: Signed, [Illegible], Special Attorney,
Department of Justice. [25]

[Endorsed]: Filed March 13, 1953.

[Title of District Court and Cause.]

RECEIPT AND FULL SATISFACTION

(Tracts Nos. L-2040, L-2043 and L-2072)

Receipt of United States District Court check No. 18471 in the sum of \$12,246.24 is hereby acknowledged in full satisfaction of that certain obligation secured by a Deed of Trust in the amount of \$13,000, executed by William Emmert Barnes, a single man, on January 30, 1950, to Farmers and Merchants Trust Company of Long Beach, a California corporation, as trustee, in favor of Farmers and Merchants Bank of Long Beach, a corporation,

and any other amounts payable under the terms thereof, recorded April 7, 1950 in Book 1558, page 371 of Official Records, Kern County, California.

Dated: March 16, 1953.

FARMERS & MERCHANTS BANK
OF LONG BEACH,

/s/ By [Illegible]

Vice President. [26]

[Endorsed]: Filed March 20, 1953.

[Title of District Court and Cause.]

PETITION FOR PARTIAL DISTRIBUTION
OF COMPENSATION PURSUANT TO
SECTION 258a, TITLE 40, USC.

(Tracts Nos. L-2040, L-2043 and L-2072)

To: The District Court of the United States, in and
for the Southern District of California, North-
ern Division:

The petition of E. S. McKendry, William Emmert Barnes and Florence Lowe Barnes, also known as Pancho Barnes, respectfully shows:

1. That E. S. McKendry and William Emmert Barnes, were, until the 27th day of February, 1953, the owners in fee simple of the property hereinafter described and that Florence Lowe Barnes, also known as Pancho Barnes, has an interest in the compensation payable for the taking of said property by reason of the ownership of certain im-

provements thereon, subject to the payment and satisfaction of all valid liens against said property.

2. That on February 27, 1953 plaintiff deposited into the registry of this Court the sum of \$203,000, together with its Declaration of Taking pursuant to the provisions of Title 40, Section 258a, U.S.C., and that heretofore and pursuant to a petition filed herein, [27] the sum of \$185,000 was paid to or for the benefit of your petitioners on account of the compensation payable for said property, leaving a balance of \$17,000 now available for payment to the parties who may be entitled thereto.

3. That the Department of Employment of the State of California claims a lien in the sum of \$1835.21, with interest at the rate of \$6.57 per month after March 31, 1953, under the Unemployment Insurance Act of the State of California.

That the Bureau of Internal Revenue of the Treasury Department of the United States claims a lien for \$7549.15, with interest to be added at the rate of \$1.18 per day from March 24, 1953, for Federal Insurance Contributions and for Withholding Tax alleged to be due from your petitioner, Florence Lowe Barnes, also known as Pancho Barnes.

4. That your petitioners, without admitting the validity of said liens against the hereinafter described property and against the fund on deposit in the registry of the Court, desire to pay under protest and have discharged, the aforesaid liens out of the funds remaining on deposit in the registry of

the Court for the condemnation and taking of the property hereinafter described.

5. The property referred to in this petition is situate in the County of Kern, State of California, and is particularly described as:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management. [28]

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Wherefore, your petitioners pray an order directing the Clerk of the Court to pay out of the funds now remaining on deposit in the registry of the Court in this proceeding, the following sums:

1. To the order of the Director of Internal Revenue, the sum of\$7,560.95
 2. To the order of the State of California,
Department of Employment, the sum of 1,841.78
- the said Order to provide that the aforesaid sums so paid shall be credited to plaintiff, United States of America, on account of the compensation to be hereafter awarded to your petitioners, or any of them, for the condemnation and taking of the above described property in this proceeding.

Dated: March 26, 1953.

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

/s/ PANCHO BARNES,

Florence Lowe Barnes, also known
as Pancho Barnes. [29]

State of California,
County of Los Angeles—ss.

E. S. McKendry, William Emmert Barnes, and Florence Lowe Barnes, also known as Pancho Barnes, each being by me first duly sworn, upon oath depose and say: That they are defendants in the above entitled action and the petitioners who executed the above petition for partial distribution of compensation; that they have each read the foregoing petition and know the contents thereof; that the same is true of their own knowledge except as to matters which are therein stated upon infor-

mation and belief and as to those matters that they believe it to be true.

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

/s/ PANCHO BARNES,

Florence Lowe Barnes also known
as Pancho Barnes.

Subscribed and sworn to before me this 26th day
of March, 1953.

[Seal] /s/ VIOLET O. RYBURN,
Notary Public in and for said County and State.

Granting of the foregoing Petition is hereby con-
sented to.

WALTER S. BINNS,
United States Attorney

A. WEYMANN,
Special Attorney, Lands Division,
Department of Justice.

/s/ By A. WEYMANN,
Attorneys for Plaintiff. [30]

[Endorsed]: Filed March 31, 1953.

[Title of District Court and Cause.]

ORDER ON PETITION FOR PARTIAL DISTRIBUTION OF COMPENSATION PURSUANT TO SECTION 258a, TITLE 40, USC
(Tracts Nos. L-2040, L-2043 and L-2072)

There having been filed and presented to the Court the verified petition of E. S. McKendry, William Emmert Barnes and Florence Lowe Barnes, also known as Pancho Barnes, for a partial distribution of the estimated compensation for the hereinafter described property, heretofore deposited into the registry of the Court, to the parties and in the manner as in said petition set forth, and Good Cause Appearing Therefor,

It Is Ordered that there be paid out of the funds remaining on deposit in the registry of the Court the following sums to the following named parties:

(a) To the order of the Director of Internal Revenue, the sum of: \$7,560.95.

(b) To the order of the State of California, Department of Employment, the sum of: \$1,841.78.

And It Is Further Ordered and Adjudged that the aforesaid sums so paid shall be credited to plaintiff, United States of America, on [31] account of the compensation to be awarded to said petitioners, or any of them, for the condemnation and taking of the property referred to in said petition and described as follows:

Those certain tracts of land situate in the County of Kern, State of California, particularly described as:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Dated: March 31, 1953.

/s/ LEON R. YANKWICH,

United States District Judge.

Presented by:

WALTER S. BINNS,

United States Attorney.

A. WEYMANN,

Special Attorney, Lands Division,

Department of Justice.

/s/ By A. WEYMANN,

Attorneys for Plaintiff. [32]

[Endorsed]: Filed March 31, 1953.

[Title of District Court and Cause.]

RECEIPT

(Tracts Nos. L-2040, L-2043 and L-2072)

Receipt of United States District Court check No. 18607, in the sum of \$7,560.95, to the order of Director of Internal Revenue, is hereby acknowledged in satisfaction of those certain claims of the Bureau of Internal Revenue, Treasury Department, against Florence Lowe Barnes, doing business as Pancho's Rancho Oro Verde, as set forth in that certain statement dated March 17, 1953 from Kalman H. Helgason, Internal Revenue Agent.

Dated: April 15, 1953.

BUREAU OF INTERNAL
REVENUE,

/s/ By FRED H. WENDELBURG,
Internal Revenue Agent. [33]

[Endorsed]: Filed April 17, 1953.

[Title of District Court and Cause.]

RECEIPT

(Tracts Nos. L-2040, L-2043 and L-2072)

Receipt of United States District Court check No. 18608, in the sum of \$1,841.78, to the order of State of California, Department of Employment, is hereby acknowledged in satisfaction of those certain claims of the State of California under

Account No. 046-0232, as set forth in the statement under date of March 17, 1953, from C. Homer Hopkins, Acting Auditor in Charge.

Dated: April 9, 1953.

STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,

/s/ By JAMES COWSILL,

Auditor in Charge

[34]

[Endorsed]: Filed April 17, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER OF
IMMEDIATE POSSESSION

To the Defendants E. S. McKendry; Florence Lowe Barnes, also known as Pancho Barnes; William Emmert Barnes; Florence Lowe Barnes, doing business as Pancho's Rancho Oro Verde:

You and Each of You Will Please Take Notice that the plaintiff, United States of America, has heretofore filed a Complaint in Condemnation to take and condemn the full fee simple title to the property described in said Complaint, and particularly described in Schedule "A" attached hereto and made a part hereof by reference, and that thereafter, to-wit on February 27, 1953, the plaintiff, United States of America, filed its Declaration of Taking of the full fee simple title to the property described in Schedule "A" annexed hereto

and simultaneously deposited into the Registry of the Court the estimated just compensation for the property so taken and condemned for the use and benefit of the parties entitled thereto; and that thereupon title to said property as set forth in the Declaration of Taking became vested in the plaintiff pursuant to the provisions of Section 258(a) of Title 40 U.S.C.A.; [35]

And You and Each of You Will Take Further Notice that on the 9th day of September, 1953, at 10 o'clock in the forenoon of that day, in the Courtroom of the United States District Court in the Post Office and Court House Building, in the City of Fresno, State of California, plaintiff will appear and apply to the Court for an Order for Immediate Possession of the lands taken in this cause.

That as grounds for the granting of said Order for Immediate Possession plaintiff states that the Assistant Secretary of the Air Forces has found and determined that it is necessary and advantageous to the interest of the plaintiff to acquire such possession, and that plaintiff is entitled to such possession as a matter of right.

Dated: Augut 27, 1953.

LAUGHLIN E. WATERS,

United States Attorney.

A. WEYMANN,

Special Attorney, Lands Division,

Department of Justice.

/s/ By A. WEYMANN,

Attorneys for Plaintiff. [36]

SCHEDULE "A"

The property affected by the annexed Notice of Motion for an Order of Immediate Possession is situate in the County of Kern, State of California, and, for convenience, is segregated into separate tracts designated by separate tract numbers and is more particularly described as follows:

Tract L-2040: West Half ($W\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$); Northeast Quarter ($NE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$); West Half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2043: West Half ($W\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$); East Half ($E\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2071: Northwest Quarter ($NW\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Tract L-2072: East Half ($E\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the offi-

cial plat of the survey of said land on file in the Bureau of Land Management. [37]

Affidavit of Service by Mail attached. [38]

[Endorsed]: Filed August 27, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET ASIDE DECLARATION OF TAKING AND TO VACATE AND SET ASIDE EX PARTE JUDGMENT

To the Plaintiff's attorneys, Laughlin E. Waters and A. Weymann:

You Will Please Take Notice that on Monday, September 21, 1953, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as the matter can be heard, in the United States Courtroom, U. S. Post Office and Court House, Fresno, California, the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, will present the within Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment.

Dated at Los Angeles, California, this 5th day of September, 1953.

/s/ PANCHO BARNES

/s/ E. S. McKENDRY

/s/ WILLIAM EMMERT BARNES

Defendants in Propria Persona. [40]

[Title of District Court and Cause.]

MOTION TO SET ASIDE THE DECLARATION OF TAKING DATED FEBRUARY 27, 1953, AND TO VACATE AND SET ASIDE THE EX PARTE JUDGMENT ENTERED THEREON, DATED MARCH 2, 1953.

Come now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court set aside the Declaration of Taking dated February 27, 1953, and to vacate and set aside the ex parte judgment entered thereon, dated March 2, 1953, for the following reasons:

I. That the estimate of "just compensation" was not arrived at in good faith and that the declaration and deposit did not comply with the requirements of the statute pertaining thereto.

II. That the Government wilfully and knowingly and deliberately acting in bad faith committed an arbitrary act against the defendants when the Government estimated and deposited a mere nominal sum and were guilty of noncompliance with statutory requirements.

This Motion will be based upon the "Declaration of Taking" on file and the "Decree on the Declaration of Taking"; on testimony [41] at the time of hearing; affidavits making a prima facie showing of noncompliance with the statute; exhibits prov-

ing bad faith in the manner of appraisal of the lands and buildings; and other and sundry documents in support of the Motion.

/s/ PANCHO BARNES

/s/ E. S. McKENDRY

/s/ WILLIAM EMMERT BARNES

Defendants in Propria Persona. [42]

[Endorsed]: Filed September 5, 1953.

[Title of District Court and Cause.]

MOTION FOR TEMPORARY RESTRAINING ORDER

Comes now the plaintiff United States of America and moves the court for a Temporary Restraining Order restraining the defendants E. S. McKendry, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, also known as Pancho Barnes, and William Emmert Barnes, and their respective attorneys, agents, servants, employees and all persons acting by, through, or under them, or either of them, or by or through their Order, from erecting or causing to be erected or continuing to erect any building, structure, or improvement of any description upon any portion of the premises described in plaintiff's complaint and its declaration of taking on file herein.

Said motion is made upon the following grounds:

1. That title to the said property upon which

said defendants are erecting and will continue to erect buildings, structures, and improvements, unless restrained, vested in the United States of America by the filing of its declaration of taking on February 23, 1953, and the deposit into the registry of this court of the estimated just compensation of \$205,000 for said property [43] of which the said defendants and each of them had due notice;

2. That without the consent and against the will of the United States of America the said defendants and each of them have remained in possession of said property since the filing of plaintiff's said declaration of taking and have started, and will, unless restrained by the Court, complete the erection of certain valuable buildings and improvements on said property;

That the continuation of said acts by the said defendants will cause immediate and irreparable injury, loss, or damage to the United States of America in that it will be put to additional expense for the removal and demolition of said buildings and structures on said land, in order to construct the airplane runway for which said property was acquired; and the erection of additional buildings and structures on said property will subject the United States of America to additional claims for damages for the acquisition and removal of such additional structures and improvements now in the course of erection.

Notice of this application and a hearing before

entering a Temporary Restraining Order should not be required because

(a) each day of delay in restraining the continuance of the acts complained of as hereinabove set forth will increase the cost to the United States of America in removing the obstructions to the construction of its aforesaid airplane runway; and

(b) the said defendants have known for more than six months last past that plaintiff required the use of said property for the construction of its said airplane runway, and that such construction would necessitate the demolition and removal of existing structures.

3. Said motion will be made upon all of the files and records in this proceeding; the affidavit of Marcus B. Sacks, verified February 1, 1954; the affidavit of Lynn J. Buttcane, verified January 29, 1954; the affidavit of Irvin H. Smith, verified January 29, 1954; the affidavit of Henry W. Yagel, verified January 29, 1954; the affidavit of Marion J. Akers, verified January 29, 1954; and the affidavit of August Weymann, verified February 2, 1954.

Dated: February 2, 1954. [44]

LAUGHLIN E. WATERS,
United States Attorney.

/s/ By A. WEYMANN,
Attorneys for Plaintiff,
United States of America. [45]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Marcus B. Sacks, Lieutenant Colonel USAF, Edwards Air Force Base, being first duly sworn, deposes and says:

That he is Staff Judge Advocate Headquarters, Air Force Flight Test Center, Edwards Air Force Base, California; that he is familiar with the property shown on the photograph marked Exhibit No. 1 attached hereto; that the area designated as "A" on said exhibit is the site of a dance hall on the subject property which was destroyed by a fire which occurred November 14, 1953;

That the building identified and shown on said photograph marked "B" did not exist at the time of said fire nor at the time of the filing of plaintiff's declaration of taking in this action; that as appears from the affidavit of Colonel Marion J. Akers attached hereto, said building is new construction placed on the premises after November 14, 1953; that said construction was not made by or with the consent of any agency of the United States of America; that the [46] attached aerial photograph, Exhibit No. 1, is an official photograph of the United States Air Force and was taken January 28, 1954.

/s/ MARCUS B. SACKS

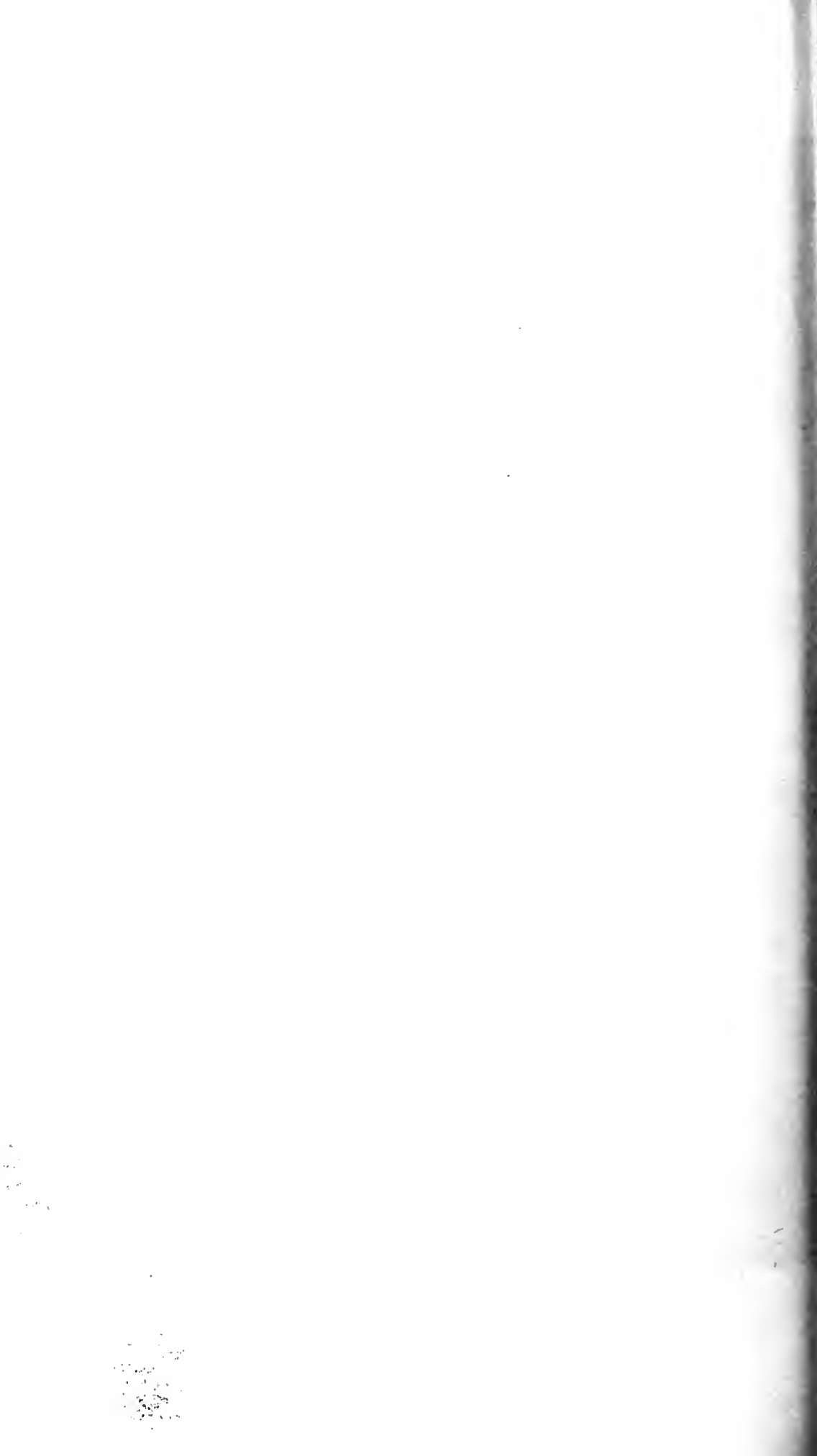
Subscribed and sworn to before me this 1st day of February, 1954.

[Seal] /s/ MARY N. DONETTI,

Notary Public in and for said County and State.



EXHIBIT NO. 1



AFFIDAVIT

Of Marion J. Akers, Colonel, 4784A, HQ, Air Force Flight Test Center, Edwards Air Force Base, California.

Marion J. Akers, Colonel, USAF, being duly sworn according to law deposes and says as follows:

On 29 January 1954, at approximately 1000 hours, Colonel Irvin H. Smith, Lt. Colonel Henry W. Yagel, A/1C Lynn J. Buttane and I went to the Pancho Barnes property to check on some new construction that had been reported in progress.

Upon arrival at the property we inquired for Pancho or Mr. McKendry and were advised that they were not present, and when we asked who was in charge during their absence we were informed that "Harry", a bartender, was. Upon contacting "Harry", the bartender, he introduced himself as Mr. Harry Goff and, in answer to the question, stated that he guessed he was in charge during Pancho's and Mr. McKendry's absence. I introduced Mr. Goff to the rest of the party and informed him that we had been requested by the United States Attorney's Office to check on some new construction that was supposedly in progress on the property. I told him that we had been asked to do this and to also secure pictures. I asked him if we could see the new construction and take pictures; he stated he guessed it was all right and escorted us to the area.

Upon arriving at the new construction area I

again asked Mr. Goff if we could take pictures of it and he replied to the effect that he guessed we had better not since he did not know what Pancho's feelings might be on the matter, and he felt it best that we did not take pictures and asked if we could come back the next day to get the pictures if Pancho would permit it. The construction area was adjacent to the swimming pool on the west side and consisted of an area being inclosed which was approximately eighteen (18) feet wide and seventy (70) to seventy-five (75) feet long. It was adjacent to the existing structure which apparently houses the dining room and a small bar. The concrete slab, over which it was being built, appeared to have been in place for some time. At the end furthest from the dining room and bar there was an area which, according to Mr. Goff, was to be built up into a big fireplace; the rest of the area would be used as a dance floor. The construction appeared to be approximately fifty (50%) per cent complete. A considerable amount of what appeared to be scrap lumber had been used in the construction and about the only new material appeared to be some 2x6's, used as studding, and a plastic covered screen which was used for the roof. I asked Mr. Goff if he were the carpenter doing the building, and he stated he was not; that there were a couple of ranch hands who were [49] carpenters that had been working on it but were not there at the time. The walls to the bottom of the eaves I would estimate to be in the neighborhood of eight (8) feet; the roof was a pitched roof. The portion

of the walls that appeared to be nearly finished consisted of various sized pieces of plywood, and other used lumber.

After looking around the area for approximately ten (10) minutes we departed and I asked Mr. Goff to advise Pancho upon her return that we had been there, and asked him to advise her why we had been there.

/s/ MARION J. AKERS

Subscribed and sworn to before me this 29th day of January, 1954.

[Seal] MARCUS B. SACKS

Lt. Colonel, USAF, Staff Judge Advocate, Hq., Air Force Flight Test Center, Edwards Air Force Base, Calif. [50]

AFFIDAVIT

Of A/1C Lynn J. Buttane, AF 19 408 466, HQ, Air Force Flight Test Center, Edwards Air Force Base, California.

Lynn J. Buttane, Airman First Class, USAF, being duly sworn according to law deposes and says as follows:

I have read the affidavit, dated 29 January 1954, of Colonel Marion J. Akers, concerning a visit to the ranch of Pancho Barnes, and corroborate the facts set forth therein.

/s/ LYNN J. BUTTCANE

Subscribed and sworn to before me this 29th day of January, 1954.

[Seal] /s/ MARCUS B. SACKS

Lt. Colonel, USAF, Staff Judge Advocate, Hq., Air Force Flight Test Center, Edwards Air Force Base, Calif. [51]

AFFIDAVIT

Of Irvin H. Smith, Colonel, 2867A, HQ., Air Force Flight Test Center, Edwards Air Force Base, California.

Irvin H. Smith, Colonel, USAF, being duly sworn according to law deposes and says as follows:

I have read the affidavit, dated 29 January 1954, of Colonel Marion J. Akers, concerning a visit to the ranch of Pancho Barnes, and corroborate the facts set forth therein.

/s/ IRVIN H. SMITH

Subscribed and sworn to before me this 29th day of January, 1954.

[Seal] /s/ MARCUS B. SACKS,

Lt. Colonel, USAF, Staff Judge Advocate, Hq., Air Force Flight Test Center, Edwards Air Force Base, Calif. [52]

AFFIDAVIT

Of Henry W. Yagel, Lt. Colonel, AO 914 704 HQ., 6510th Installations Group, Edwards Air Force Base, California.

Henry W. Yagel, Lt. Colonel, USAF, being duly sworn according to law deposes and says as follows:

I have read the affidavit, dated 29 January 1954, of Colonel Marion J. Akers, concerning a visit to the ranch of Pancho Barnes, and corroborate the facts set forth therein. The new building under construction set forth in Colonel Akers' statement was not in existence during and immediately after the Pancho Barnes fire, which occurred on 14 November 1953.

/s/ HENRY W. YAGEL

Subscribed and sworn to before me this 29th day of January, 1954.

[Seal] MARCUS B. SACKS,
Lt. Colonel, USAF, Staff Judge Advocate, Hq., Air
Force Flight Test Center, Edwards Air Force
Base, Calif. [53]

AFFIDAVIT OF AUGUST WEYMANN IN
SUPPORT OF APPLICATION FOR TEM-
PORARY RESTRAINING ORDER

State of California,
County of Los Angeles—ss.

August Weymann, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney having immediate charge of the prosecution of the above entitled condemnation proceeding for the plaintiff, and that he is familiar with the facts herein set forth.

The above entitled action was filed February 27,

1953, to acquire the property therein described and hereinafter referred to for military purposes in connection with the expansion of the Edwards Air Force Base in Kern County, California.

That coincident with the filing of the complaint plaintiff filed its declaration of taking for four tracts of land comprising all of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California, and simultaneously deposited into the registry of the court the sum of \$205,000 as the estimated just compensation to be paid therefor; [54] that thereupon this Court made its decree on said declaration of taking wherein it was adjudged and decreed that the full fee simple title to said land is vested in the United States of America, subject, however, to existing easements for public roads and highway, public utilities, railroads, and pipe lines. Said decree was duly entered March 2, 1953; that thereupon and thereafter and pursuant to petitions to this Court made by E. S. McKendry, Florence Lowe Barnes, also known as Pancho Barnes, and William Emmert Barnes, as the ostensible former owners of said lands, the sum of \$194,402.72 was paid out of the registry of the court to or for the account of the above named defendants on account of just compensation for the taking of said property, which the said defendants have ever since retained; that said payments were made during the months of March and April of 1953; that said defendants have ever since remained and now remain in possession and occupancy of said premises

notwithstanding the vesting of title in plaintiff as aforesaid.

That on August 27, 1953, plaintiff served on the aforesaid defendants its notice of motion for immediate possession of said property; that said motion came on for hearing before the Honorable Campbell E. Beaumont, one of the Judges of this Honorable Court, on September 21, 1953, the above named defendants appearing in opposition to said motion and resisting the same; that thereupon said motion was continued for further hearing to October 27, 1953, when it was again opposed by the above named defendants, and still remains undetermined; that thereafter and on or about November 14, 1953, and while the said defendants still remained in possession and occupancy of said premises and the buildings thereon, a fire occurred which destroyed one of the buildings thereon; that thereafter the said defendants commenced the construction and erection of new buildings and structures on the said premises, and as affiant is informed by personnel of the Edwards Air Force Base, whose affidavits are annexed hereto and made a part of plaintiff's motion for a temporary restraining order, will continue and complete such construction work unless restrained by this Honorable Court.

That annexed hereto and made a part of this affidavit are true copies of [55]

- (a) Plaintiff's complaint in condemnation;
- (b) Decree on declaration of taking entered by this Court;
- (c) Petition of E. S. McKendry, Florence Lowe

Barnes, and William Emmert Barnes, for payment of funds out of the registry of the court on account of the compensation payable for the condemnation and taking of the property; and

(d) Order of this Court directing the payment of the sum of \$185,000 to or for the account of the said defendants, dated March 11, 1953.

That as more fully appears from the testimony taken on plaintiff's application for immediate possession, the subject property lies on the center line of the extension of the new test runway presently under construction for the Air Force Flight Test Center at Edwards Air Force Base, California, and that to complete the runway and to make available for use in connection therewith a two-mile clear zone, it will be necessary to remove all obstructions to flight and safety in connection with the operations of the Air Force Flight Test Center.

That if defendants are permitted to continue with the construction and erection of further improvements thereon, the cost of removing the obstructions to plaintiff's proposed runway will be substantially increased.

/s/ A. WEYMANN,
Affiant.

Subscribed and sworn to before me this 2nd day of February, 1954.

[Seal] /s/ ALBERT N. MINTON,
Notary Public in and for said County and State.

[Endorsed]: Filed February 2, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY TEMPORARY RESTRAINING ORDER SHOULD NOT ISSUE

The above entitled cause having come on to be heard upon plaintiff's motion for a temporary restraining order, supported by affidavits annexed thereto; and

It appearing to the satisfaction of the Court that a temporary restraining order preliminary to hearing upon motion for a preliminary injunction should issue because immediate and irreparable injury, loss, and damage will result to the plaintiff, in that the defendants hereinafter named are constructing upon the property of the plaintiff without its consent buildings and structures and will continue so to do unless restrained, which the plaintiff will be obliged to remove and demolish for the construction of an airplane runway of the Air Flight Test Center at Edwards Air Base, California, thereby causing increased cost and damage to the plaintiff in the removal and demolition of obstructions in the path of plaintiff's runway;

Now, Therefore, on motion of the plaintiff,

It Is Ordered that the defendants Florence Lowe Barnes, also known [72] as Florence Lowe Barnes McKendry, also known as Pancho Barnes; E. S. McKendry, and each of them, be and appear before the above entitled court in the court room of the

Honorable Leon R. Yankwich, a Judge of said court, in the United States Post Office and Court House, at Fresno, California, at ten o'clock in the forenoon of Friday, February 5, 1954, or as soon thereafter as counsel can be heard, then and there to show cause, if any they have, why a temporary injunction should not issue restraining them and each of them, their attorneys, agents, servants, employees, and all persons acting by, through, or under them, or any of them, or by or through their order, from constructing or continuing with the construction of any building, structure, or improvement of any kind or character and any part of that certain real property described as Section 20, Township 9 North, Range 10 West, S.B.B.M., according to the official plat of the survey of said land on file in the Bureau of Land Management. Said property being located in the County of Kern, State of California; and good cause appearing

It Is Further Ordered that service of a copy of this order, plaintiff's motion and the supporting affidavits attached thereto, made on the defendants E. S. McKendry, Pancho Barnes, and William Emmert Barnes at or before 12 o'clock noon on February 4, 1954, shall be sufficient notice of this order, such service to be made by delivering a copy of this order, plaintiff's motion and the supporting affidavits, to one or more of said defendants upon the premises above described, and if none of the said defendants can be found on said premises, by de-

livering said copies to any person of suitable age found on said premises.

Dated: February 2nd, 1954, at 3:15 o'clock p.m.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney,

/s/ By A. WEYMANN,
Assistant United States Attorney,
Attorneys for Plaintiff,
United States of America. [73]

[Endorsed]: Filed February 2, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To the Plaintiff's Attorneys, Laughlin E. Waters
and A. Weymann:

You will please take notice that on Monday, September 21, 1953, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as the matter can be heard, in the United States Courtroom, U.S. Post Office & Court House, Fresno, California, the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, will present the within Motion To Dismiss.

Dated at Los Angeles, California, this 5th day of September, 1953.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

WILLIAM EMMERT BARNES,

Defendants in Propria Persona [78]

MOTION TO DISMISS

Come now the defendants, Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and move this Honorable Court that the Complaint on file herein be dismissed for the following reasons:

1. Improper and illegal initiation of the Condemnation Suit.

2. The Statutes are not explicit and lack express legislative power as to the defendants' lands.

3. The Petition is instituted in bad faith and with spiteful and malicious intent and the acquiring agency acted arbitrarily, capiciously, not in compliance with the Statutes and with fraudulent intent, abuse of discretion, and the defendants are informed and believe that there has been misappropriation of the appropriation for Muroc Air Force Base as set forth in Public Law 564, approved June 17, 1950.

This Motion will be based upon the pleadings on file in the within action and upon the Memorandum of Points and Authorities and on such documents,

affidavits, witnesses and arguments as [79] offered in support of the motion.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

/s/ WILLIAM EMMERT BARNES,

Defendants in Propria Persona [80]

[Endorsed]: Filed Sept. 5, 1953.

[Title of District Court and Cause.]

ORDER DENYING TEMPORARY INJUNCTION

The above entitled cause came on regularly to be heard in the above entitled court, United States Post Office and Court House, at Fresno, California, the Honorable Leon R. Yankwich, Judge presiding, on February 5, 1954, on an order to show cause, issued on application of the plaintiff, returnable on that date, why a temporary injunction should not issue restraining the defendants, E. S. McKendry, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, also known as Pancho Barnes, from constructing or continuing with the construction of any buildings, structures, or improvements of any kind or character on the property hereinafter described. Plaintiff appeared by Laughlin E. Waters, United States Attorney, by August Weymann, Assistant United States Attorney, in support of the motion for a temporary in-

junction; the defendants E. S. McKendry and Florence Lowe Barnes appeared in propria persona in opposition to said motion.

Oral testimony and documentary evidence were received by the court and the matter argued; and the court being fully advised in the premises, finds:

1. That a defeasible title to the lands and premises hereinafter described became vested in the plaintiff, United States of America, on February 27, 1953, by the filing of plaintiff's declaration of taking and the deposit of the estimated just compensation into the register of the court for the use of the parties entitled thereto; that subsequent to the filing of said declaration of taking, defendants and respondents, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, and as Pancho Barnes, and E. S. McKendry and William Emmert Barnes, filed in this proceeding a motion to set aside such declaration of taking and vacate and set aside the ex parte judgment upon the declaration of taking and a motion to dismiss this action, which motions are still pending before this court before the Honorable Campbell E. Beaumont, one of the judges thereof. That by reason thereof, the issue as to the title is contested as between the plaintiff and the above-named defendants and respondents and is still undecided by this court. That further proceedings upon such motions are set for February 23 and 24, 1954.

2. That the defendants and respondents Pancho Barnes, E. S. McKendry, and William Emmert

Barnes, were in the exclusive possession of the lands and premises hereinafter described and were lawfully entitled to be in the exclusive possession thereof on February 2, 1954, and at all times thereafter up to this date.

3. That prior to the filing of this suit and the filing of the declaration of taking referred to in Finding 1 and prior to the filing of this action, the improvement in structure which is the subject matter of the order to show cause why a temporary restraining order should not issue and a preliminary injunction should not issue in this proceeding, had already been erected and constructed upon the premises hereinafter described to the following extent: That the cement foundation had been laid and was in place, that the walls had been erected and were in place, that the [94] pillars and crossbeams had been erected and were in place and the structure was covered with a sunshade or drape, and such structure had been and was being used by the defendants and respondents.

3. That without the consent and against the will of the United States of America the said defendants have made changes in the physical characteristics of said property by constructing certain improvements thereon and they will continue with such construction unless enjoined by this court from proceeding with said construction; that such improvements were made while said defendants and respondents were lawfully in possession of said premises and lawfully using the same, and for the purpose of protecting said improvements by plac-

ing thereon a plastic-coated impervious roof, and by proposing to construct and erect thereon window frames and doors so as to enclose the same; that the order to show cause in this case was issued and served after the doors and windows had been obtained and brought to the premises, but before they were actually placed in and attached to the building; that the roof construction had been completed prior thereto;

4. That defendants and respondents Pancho Barnes and E. S. McKendry offered and stipulated in open court as follows:

“I would like to make a stipulation in writing, if it would satisfy Mr. Weymann and the Air Force, that we will construct nothing that will in any way be of any cost to them to demolish or tear down anything that we may put up, such as a sunshade, or that we will remove it at our own expense.”

5. That plaintiff will suffer no injury, loss or damage by the continuance of the acts of the defendants in constructing the improvements aforesaid; that if any monetary damage should accrue as a result of such construction of improvements upon said premises, plaintiff has a plain, adequate and complete remedy at law by offsetting the amount thereof as against compensation to be paid to [95] said defendants and respondents or by recovery of a money judgment from them for the amount thereof.

6. That on February 2, 1954, the date of the issuance of the order to show cause herein, there was pending before this court before the Honorable

Campbell E. Beaumont, one of the judges thereof, a motion by the plaintiff under Title 40, Sec. 258(a), USC, for an order of possession of the premises hereinafter described, which motion was being contested by defendants and respondents, Pancho Barnes, E. S. McKendry and William Emmert Barnes, and was and still is at issue and upon which a hearing had been set before Judge Beaumont to commence February 23, 1954.

7. That it is not true that the land and premises hereinafter described lie within the construction of the new test runway presently under construction for the Air Force Flight Test Center at Edwards Air Force Base, California; that, to the contrary, said land and premises are not less than three miles from the exterior limits of said runway. That no evidence was received of any plans on the part of plaintiff to bring such runway any closer to such land and premises.

8. That by reason of the facts found as aforesaid, the court is of the opinion and concludes and decides that plaintiff is not entitled to a temporary injunction as prayed for.

9. That the lands and premises hereinabove referred to are known as $W\frac{1}{2}$ of $NW\frac{1}{4}$; $NE\frac{1}{4}$ of $NW\frac{1}{4}$; $W\frac{1}{2}$ of $SE\frac{1}{4}$ of $NW\frac{1}{4}$; $W\frac{1}{2}$ of $NE\frac{1}{4}$; $E\frac{1}{2}$ of $SE\frac{1}{4}$ of $NW\frac{1}{4}$; $NW\frac{1}{4}$ of $SW\frac{1}{4}$; $E\frac{1}{2}$ of $NE\frac{1}{4}$, all in Section 20, Township 9 North, Range 10 West, S.B.B. & M., according to the official plat of the survey of said land on file in the Bureau of Land Management.

Wherefore, it is ordered and adjudged that the application of the United States of America for a temporary injunction enjoining and restraining Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, also known as Pancho Barnes; E. S. [96] McKendry, and William Emmert Barnes, and each of them, their attorneys, agents, servants, employees, and all persons acting by, through, or under them, or any of them, or by or through their order, from constructing or continuing with the construction of any building, structure or improvement of any kind or character on any part of the real property described in Finding 9, be and it is hereby denied.

Dated: February....., 1954.

United States District Judge.

Presented by:

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Defendants and Respondents
in Propria Persona. [97]

Points and Authorities

Summary of the facts adduced at the hearing

Order to show cause upon one day's notice issued and directed to Pancho Barnes and E. S. McKendry only, requiring them to appear in Fresno before the Honorable Leon R. Yankwich, then and there to show cause why temporary injunction should not be issued restraining and enjoining them

from constructing or continuing with the construction of any building, structure or improvement of any kind or character upon the lands which are the subject matter of this action. At the outset the Court stated that he had full knowledge of and was considering as a part of this proceeding the pending proceedings before Judge Beaumont which consisted of the following:

1. Motion to dismiss the complaint by the respondents to this motion;

2. A motion to vacate and set aside the declaration of taking and the ex parte decree on declaration of taking made by these respondents; and

3. Motion by the United States to obtain an order of possession of the premises which are the subject matter of these proceedings.

All of said motions have been entertained by Judge Beaumont and were presently pending before him, all were contested and at issue and all were undecided and the issues presented by each and all of them were scheduled for further hearing and oral arguments commencing on February 23, 1954.

The construction complained of by the United States had for the most part been made and done before the action was filed and the declaration of taking was filed. Additional placement of an impervious roof, procuring of doors and windows with the intention [98] of placing them, had progressed to the extent that the doors and windows had been procured and were on the premises, but had not been actually attached to the building.

The Government's title is a defeasible one which was under contest actually in issue at the date of the issuance of this order to show cause and at the date of the hearing thereon.

The operation of Sections 3 and 5 of the Declaration of Taking Act, 40 USC, Section 258 (a), is to cut off the Government's right to abandon the proceedings. It is not to compel the owners to submit to unauthorized takings. Accordingly, in our opinion, the right of the owner to challenge the validity of the taking in nonconformity with the prescribed statutory provisions was not destroyed by such act. *Catlin vs. U.S.* 324 US 229, at page 243.

2. Until this court had disposed of the Government's motion to obtain possession, the legal possession was and is vested in the defendants and respondents. "Upon the filing of declaration of taking, the court shall have power to fix the time in which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner." Title 40, Sec. 258(a), USC, last paragraph.

3. One in lawful possession of premises which are being condemned has the right to make improvements thereon during such lawful possession, subject only to the limitation that he may not claim and collect compensation for such additions or improvements as he makes. *Naval Government of Guam vs. Certain Meters of Land* 102 Fed. Sup., 427, 430, Section 1249, CCP.

4. A temporary injunction will not be granted

if the applicant has a plain, adequate and complete remedy at law. Title 28, Section 284, USC.

5. Here the plaintiff has a plain, adequate and complete remedy at law:

(a) By right of offset. U.S. vs. Miller, 317 US 369 at page 382; [99]

(b) Through the fact that it does not have to pay for improvements made after the condemnation proceedings are filed.

“Generally speaking, a landowner is not entitled to compensation for improvements placed on land after it is appropriated to a public use.” 29 CJS Title “Eminent Domain,” Paragraph 175(2), page 1048. Section 1249 CCP, Subdivision (c).

Defendants and respondents have estopped themselves by their stipulation to claiming any compensation for these improvements.

6. “A court of equity is sedulous to prevent the successful invocation of its interlocutory injunction to perform the function of a successful action of ejectment and at the same time to avoid the trial of title indispensable to such an action.” *Folk vs. U.S.*, 233 Federal Reporter 177 at page 183.

Comment: Here the factual situation is that at the time of the issuance of this order to show cause and at the time of the hearing thereon, there was pending before Judge Beaumont contested issue as to the Government’s title to the premises and as to the right of possession to the premises. The necessary intent of this application was to circumvent the result of such issues before Judge Beaumont to

have them determined in this ancillary proceeding upon one day's notice.

7. "It is familiar law that injunction will not issue to enforce a right that is doubtful or to restrain an act, the injurious consequences of which are merely trifling. If the evidence be conflicting and the injury doubtful, this extraordinary remedy of injunction properly may be withheld when it is applied for before the asserted right has been established at law." *Burroughs vs. City of Dallas*, 276 Fed. Rep., 812 at page 814. [100]

8. The extraordinary remedy of injunction is not warranted where, as here, there is an adequate remedy at law. (*Mathes, J.*) *United States vs. Petersen*, 91 Fed. Sup. 209, 213. [101]

Affidavit of Service by Mail

State of California,
County of Los Angeles—ss.

Guilford L. White being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 408 S. Spring, Los Angeles, Calif., that on the 13th day of February, 1954, affiant served the within Order Denying Temporary Injunction on the Plaintiffs in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Plaintiffs at the office address of said attorney, as follows "August

Weymann, Assistant United States Attorney, 807 Federal Building, Los Angeles 12, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in a mailbox, sub-post office, substation, or mail chute (or other like facility) regularly maintained by the Government of the United States in the United States Post Office in the City of Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ GUILFORD L. WHITE

Subscribed and sworn to before me this 13th day of February, 1954.

[Seal] /s/ RICHARD C. MARSH,
Notary Public in and for the County of Los Angeles, State of California. [102]

[Endorsed]: Lodged February 13, 1954.

[Endorsed]: Considered and Denied February 15, 1954.

In the United States District Court, Southern
District of California, Northern Division

No. 1253-ND Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

360 ACRES OF LAND in the County of Kern,
State of California; E. S. McKENDRY, et al.,
Defendants.

TEMPORARY INJUNCTION

The above entitled cause came on regularly to be heard in the above entitled court, United States Post Office and Court House, at Fresno, California, the Honorable Leon R. Yankwich, Judge presiding, on February 5, 1954, on an order to show cause, issued on application of the plaintiff, returnable on that date, why a temporary injunction should not issue restraining the defendants, E. S. McKendry, Florence Lowe Barnes, also known as Florence Lowe Barns McKendry, also known as Pancho Barnes, and William Emmert Barnes, from constructing or continuing with the construction of any buildings, structures, or improvements of any kind or character on the property hereinafter described. Plaintiff appeared by Laughlin E. Waters, United States Attorney, by August Weymann, Assistant United States Attorney, in support of the motion for a temporary injunction; the defendant, E. S. McKendry and Florence Lowe Barnes appeared in propria persona in opposition to said motion; de-

fendant William Emmert Barnes failed to appear.

Oral testimony and documentary evidence were received by the court and the matter argued; and the court being fully advised in the premises, finds:

1. That title to the land and premises herein-after described became vested in the plaintiff, United States of America, on February 27, 1953, by the filing of plaintiff's declaration of taking and the deposit of the estimated just compensation into the registry of the court for the use of the parties entitled thereto; that ever since said February 27, 1953, United States of America was and now is the owner of said property by virtue of the filing of the declaration of taking as aforesaid;

2. That notwithstanding the ownership of said property by the United States of America as aforesaid, the above named defendants continued to occupy said premises to the exclusion of the United States of America;

3. That without the consent and against the will of the United States of America the said defendants have made changes in the physical characteristics of said property by constructing certain improvements thereon and they will continue with such construction unless enjoined by this court from proceeding with said construction;

4. That plaintiff will suffer irreparable injury, loss, and damage by the continuance of the said acts of the defendants as aforesaid, in that plaintiff will be put to additional expense for the removal of said

construction upon securing possession of said premises, and that the appraisal of the value of the structures and improvements for which the said defendants may be entitled to compensation in plaintiff's condemnation proceeding will be made more difficult and uncertain;

5. That by reason of the facts found as aforesaid the court is of the opinion and decides that plaintiff is entitled to a temporary injunction as prayed for;

Wherefore, it is ordered and adjudged that the defendants, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, also known as Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and their respective attorneys, agents, servants, employees, and all persons acting by, through, or under them, or either of them, or by or through their order, be and they hereby are enjoined [104] until the further order of the court from erecting or causing to be erected or continuing to erect any building, structure, or improvement of any description upon any portion of the premises described in plaintiff's complaint and its declaration of taking on file herein. Said premises are known and described as all of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California.

Dated: February 15, 1954.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

LAUGHLIN E. WATERS,

United States Attorney

AUGUST WEYMANN,

Assistant United States Attorney

/s/ By A. WEYMANN,

Attorneys for Plaintiff. [105]

Affidavit of Service by Mail attached. [106]

[Endorsed]: Judgment Filed and Entered Feb.
15, 1954.

[Title of District Court and Cause.]

MEMORANDUM OF OPINION AND ORDERS

The government deposited with the Clerk of the Court the sum of \$205,000 as estimated compensation for the taking of the property in question, which is situated in the vicinity of Edwards Air Base in Kern County, California. After the deposit was made these defendants requested, and were granted, the withdrawal of \$194,000. It is clear that the acceptance of such amount constitutes a waiver of objections to the taking.

Defendants' motion to dismiss the action is denied.

Defendants' motion to set aside the declaration of taking is denied.

The government's motion for possession is granted upon the terms hereinafter set forth.

The chief problem of the court is to fix a time at which the government shall take possession of the premises. The government contends that it is faced with a dangerous situation in that the property is in the zone of accidents from high-speed planes which are in training there. The defendants have claimed that there is very little likelihood of such immediate danger; that it would be unfair to dispossess them of the property as the situation now exists and is likely to be for an extended time in [107] the future.

On October 28, 1953, at page 184 of the transcript beginning at line 23, Colonel Akers, Chief of Staff, was a witness on re-direct examination. The following there appears:

“The Court: And where is the work being done now, on this map?

The Witness: You mean the construction work?

The Court: Yes, whatever work is being done for the purpose of completing this runway and this system that you have in mind. Where is the work being done now?

The Witness: The construction work in general is being done in this area (indicating) on the runway. Around up here on the taxi-way ramp area; and the building area, roads and so forth, up here (indicating), there is construction work.

The Court: And how far would that be from Miss Barnes' property?

The Witness: Offhand, I would estimate it would be in the neighborhood of three miles, statute.

The Court: Now, is there any degree of reasonable likelihood that with the work being done here

(indicating), three miles away from her property, that her property or anyone there would be injured?

The Witness: Yes, sir. The likelihood exists, because the aircraft are flying over this area every day." * * * * *

"The Witness: I am not sure, your Honor, but let me answer it this way: The work with respect to constructing the runway itself, that is, the [108] building of runways or buildings, that is not the work that endangers her property or anyone else's property.

The Court: That is what I want to know.

The Witness: It is the flying of aircraft, the testing of aircraft.

The Court: What I want to find out is the necessity for the immediate possession of the property; and I am trying to determine whether there is any likelihood that there will be injury resulting if it isn't ordered now, or whether it should be ordered at a later time.

The Witness: That is a difficult question to answer your Honor. I think we went into something like that before. Naturally, we do not want accidents to happen, but our mission, our job, is to test these new airplanes and find out what is wrong with them. In the course of testing, the accidents do occur, may occur at any time in flight, take-off or landing. It may be over the property or somewhere else. There is that danger of accidents happening at any time, on the property or anywhere else.

The Court: Let me say that I am now referring

to Exhibit No. 4 and Enclosure No. 3. Here is the runway, in a northeasterly direction, from B to A.

The Witness: That is the runway being built.

The Court: Being built?

The Witness: That is not the runway in use at the present time.

The Court: Where is the one in use?

The Witness: This one right here (indicating), [109] your Honor, indicated by the dark line.

The Court: This one from B to A is the one being built for future use?

The Witness: That is correct, sir.

The Court: Has there been any work done on that runway yet?

The Witness: Yes, sir. The work on that runway is, I would say, approximately 20 to 25 per cent completed.

The Court: What is the distance between the yellow of Miss Barnes' property and the southwesterly place marked 'B' of the runway which is being now worked on?

The Witness: I would judge it to be in the neighborhood of two or three miles, your Honor.

The Court: When do you expect to do work from 'B' to Miss Barnes' property?

The Witness: Would you mind saying—

The Court: I will ask you what kind of work do you expect to do there?

The Witness: The only work with respect to construction will be the removal of obstructions to flight.

The Court: There will be no runway?

The Witness: That is correct. It is not planned to build a runway across there. In the two-mile clear zone, obstructions to flight will be removed so aircraft can land, if necessary, wheels up, doing a minimum amount of damage; in other words, so they don't run into a telephone pole, ditch or something like that.

The Court: You expect to have jet planes flying there? [110]

The Witness: Yes, sir; not only jet planes, but other flights."

It will be borne in mind that the defendants' property lies southwesterly from the Edwards Air Base, and the ground rules there provide that a take-off of airplanes must be in a northeasterly direction.

There is testimony in the record that the government will not complete the proposed work until December, 1954.

It is my view that the government should have an order of possession.

It is ordered that the defendants shall be required to surrender possession of the premises to the plaintiff at 12:00 o'clock noon May 22, 1954.

In the meantime, and until said surrender of possession, it is ordered that the defendants shall not impede or interfere with or harass the agents of the government who go on the premises for the purpose of preparing for the trial of this proceeding; that such agents shall not enter upon said property for any other purpose; that while on said premises for such purpose they shall not harass

said defendants, or any of them, or defendants' servants or agents, and shall not interfere with the defendants' possession or rights in any way, and that they shall restore to its original place any property necessary to be moved in making their investigation.

In the court's opinion the above order of possession is fair and reasonable.

Dated: March 19, 1954.

/s/ C. E. BEAUMONT,
Judge. [111]

[Endorsed]: Filed March 22, 1954.

[Endorsed]: Judgment Docketed and Entered March 23, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AMENDMENT TO MOTION
TO SET ASIDE DECLARATION OF TAK-
ING AND TO VACATE AND SET ASIDE
EX PARTE JUDGMENT

Come Now the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, and by way of amendment to their Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment heretofore served and filed in these proceedings, move this Honorable Court that the Declaration of Taking on file herein be set aside and that the ex parte judgment on file herein be vacated and that other orders and decrees in said proceedings subsequent to the filing of said Declar-

ation of Taking be vacated and set aside for the following reasons:

1. That these proceedings are in violation of the United States Constitution and particularly the Fifth and Fourteenth Amendments thereof.

2. That the United States has not been authorized by any Act of Congress to acquire the lands of these moving defendants through these condemnation proceedings.

3. That this proceeding was commenced and has been prosecuted in bad faith and with express malice toward these defendants and each of them [112] and particularly toward defendant Pancho Barnes, and that such express maliciousness was held by the Secretary of the Air Force, the Assistant Secretary of the Air Force and the acquiring agency of the land taken under the declaration of taking and the decree rendered thereon.

That Bernard Evans, acting in bad faith and actual malice, did make the only appraisal of the defendants' property and did not use that degree of skill necessarily required by one of his profession and acting in his capacity. He refused to take time to look at much of the ranch and the many installations thereon. He was slipshod and hurried in his methods. He consumed approximately 11 hours total time in appraisal work on the premises. (One appraiser of the defendants required 13 days on the property to cover its assets). There was malevolent intent on the part of Bernard Evans in his recommendation to the acquiring authorities and thus to the Secretary of the Air Force. The

Assistant Secretary of the Air Force, one Edwin V. Huggins did on the 3rd day of February, 1953, sign a Declaration of Taking with a Schedule "A" attached thereto, which included the sum set as estimated just compensation at \$205,000. The Declaration of Taking filed on February 27, 1953, was followed by a Decree on Declaration signed by Judge Yankwich which was stamped "Judgment docketed and entered March 2, 1953". Subsequently a "temporary injunction" against the defendants was signed by Judge Yankwich which constitutes a further "taking". The information put before Judge Yankwich by way of affidavits and testimony was made in bad faith and with intense malevolent intent by Colonel Akers and Colonel Sacks and other Air Force personnel not for the reason as stated but to hamper and interfere with the defendants' business and in furtherance of other actions to hamper and interfere with the defendants' business.

The Fifth Amendment to the Constitution of the United States states "Nor shall private property be taken for public use without just compensation". There is a strong prima facie case that the amendment has been abused and nullified in this case of United States vs. 360 Acres of Land and a showing of deliberate bad faith in the appraisal and/or recommendation in so much as the United States Government did pay the sum of \$593,500.00 [113] for 240 acres of undeveloped desert land as shown in the deed made to them by Macco Corporation recorded May 12, 1953, at the Kern County Re-

corder's Office (Pancho Barnes' Exhibit No. 10 for identification). This land is adjacent to and approximately $\frac{3}{4}$ of a mile from the defendants' property but badly located and not even on a road. This property is absolutely unimproved vacant desert land and without water. The defendants' 360 acres of land is highly improved, located on a main highway, has 5 wells (one of which is sufficient to the needs of the property), approximately 40,000 square feet (at the time of condemnation) of buildings. (Reasonable replacement for buildings alone value about \$400,000.00.) Approximately 100 acres under irrigation, highly improved airport, stock corrals, fences and cross fences. One of the finest rodeo grounds in the United States and two race tracks, landscaping, etc. The \$205,000 estimated as "just compensation" is not sufficient money to allow the defendants to remove themselves from the premises let alone of re-establishing themselves to permit a reentering of their same business.

The defendants have been subjected to the most virulent discrimination by the United States Government when it willingly negotiates a settlement of \$593,500.00 with Macco Corporation for 240 acres vacant desert land adjacent to the defendants' property and condemns defendants' land of 360 acres of highly developed and productive land for only \$205,000.

In his signing of the Declaration of Taking the Assistant Secretary of the Air Force relied and acted on the fraudulent, malevolent, unjust and incorrect recommendation of his agents. The de-

fendants have information and belief that the present Secretary of the Air Force, Harold Talbot, has full knowledge of the proceedings of this case and that by his acquiescence in the matter consciously and deliberately perpetuates the bad faith, malevolence and arbitrary actions upon which this entire case is predicated.

The defendants requested a salvage value on their property, as is customary in other land acquisitions in the vicinity. Colonel Shuler of the United States Corps of Engineers told the defendants that the appraisal of their property was not sufficiently complete to be able to give them a [114] salvage value. The defendants have a letter dated 3 September, 1953 from Colonel Frye presently District Engineer stating that "the appraisal made on your property did not contain a salvage value on the improvements, and no salvage value has been arrived at since. Therefore, at this time, as in the original offer, this office can give you no salvage figure."

A subpoena duces tecum was served upon J. L. Maritzen to produce in court on October 27, 1953, the appraisal made by the appraiser, Mr. Bernard Evans, who was employed by the United States Corps of Engineers to appraise defendants' property. The appraisal is available to Mr. Maritzen. A Motion to Quash by the plaintiff is still before the Court. In a recent decision by Judge William Mathes it was held that "government confidential files are not necessarily privileged", that a defendant in a condemnation proceeding was entitled to

see the appraisal. As the government has refused to proffer the appraisal data the following holds true: Cal. C.C.P. 1963 Sub-section 5. "Evidence wilfully suppressed would be adverse if produced."

That in furtherance of such bad faith and actual malice, as aforesaid, the parties heretofore named and described and the acquiring agency acted and have continued to act arbitrarily and capriciously with express intention of and in the exercise of abusive discretion and contrary to the law and statutes in force and effect.

4. That plaintiff by these proceedings has not intended and does not intend in good faith to acquire the use of the lands belonging to these defendants for any lawful purpose of the United States but, to the contrary, are using these proceedings as a method of evicting these defendants and preventing them from carrying on in said premises.

Said motion will be based upon the pleadings on file, the evidence heretofore introduced to the court in support of the original motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment, the memorandum of points and authorities heretofore submitted, and oral argument to be made in behalf of the defendants pursuant to the order of this court. [115]

/s/ PANCHO BARNES

/s/ E. S. McKENDRY

/s/ WILLIAM EMMERT BARNES

[Endorsed]: Filed February 23, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AMENDMENT TO
MOTION TO DISMISS

Come Now the defendants, Pancho Barnes, E. S. McKendry and William Emmert Barnes, and by way of amendment to their Motion to Dismiss heretofore served and filed in these proceedings, move this Honorable Court that the complaint on file herein be dismissed and that all other orders and decrees in said proceedings subsequent to the filing of said complaint be vacated and set aside for the following reasons:

1. That these proceedings are in violation of the United States Constitution and particularly the Fifth and Fourteenth Amendments thereof.

2. That the United States has not been authorized by any Act of Congress to acquire the lands of these moving defendants through these condemnation proceedings.

3. That this proceeding was commenced and has been prosecuted in bad faith and with express malice toward these defendants and each of them and particularly toward defendant Pancho Barnes, and that such express maliciousness was held by the Secretary of the Air Force, the Assistant Secretary of the Air Force and others whose misrepresentations previous [122] to the filing of condemnation were relied upon and adopted by the Secretary of the Air Force and the Assistant Secretary of the Air Force. Colonel Maxwell and Colonel Gilkey

both acted in bad faith and with malicious intent to harm defendant Pancho Barnes and so informed her of their intentions. Their actions and recommendations resulted in the Secretary of the Air Force and the Assistant Secretary of the Air Force acting according to their recommendations. Colonel Gilkey informed the defendants Pancho Barnes and E. S. McKendry that he had changed the entire plans of the air base with the sole purpose of getting rid of them, which statement was so borne out by the changing of the master plan and by subsequent action that it is logical to assume that the Secretary and the Assistant Secretary of the Air Force acted upon his recommendation which recommendation was made in bad faith. The making of biased and malevolent recommendations through channels to the Secretary of the Air Force was done in an attempt to harm the defendants as distinguished from serving the government and the taxpayers of the country.

That in furtherance of such bad faith and actual malice, as aforesaid, the parties heretofore named and described and the acquiring agency acted and have continued to act arbitrarily and capriciously with express intention of and in the exercise of abusive discretion and contrary to the law and statutes in force and effect.

4. That plaintiff by these proceedings has not intended and does not intend in good faith to acquire the use of the lands belonging to these defendants for any lawful purpose of the United States but, to the contrary, are using these pro-

ceedings as a method of evicting these defendants and preventing them from carrying on and occupying lawful businesses which they are carrying on in said premises.

Said motion will be based upon the pleadings on file, the evidence heretofore introduced to the court in support of the original motion to dismiss, the memorandum of points and authorities heretofore submitted, and oral argument to be made in behalf of the defendants pursuant to the order of this court. [123]

/s/ PANCHO BARNES

/s/ E. S. McKENDRY

/s/ WILLIAM EMMERT BARNES

Defendants in Propria Persona. [124]

[Endorsed]: Filed February 23, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that E. S. McKendry and Pancho Barnes (also known as Florence Lowe Barnes and as Florence Lowe Barnes McKendry), defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order and Decree entitled "Temporary Injunction" made and entered in this cause on the 15th day of February, 1954, by the Honorable Leon R. Yankwich, Chief Judge, and enjoining

these appellants and each of them until the further order of said court from erecting or causing to be erected or continuing to erect any building, structure or improvement of any description upon any portion of the premises described in plaintiff's complaint in this cause.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in propria persona.

Box 37, Muroc, California. [126]

[Endorsed]: Filed March 17, 1954.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, E. S. McKendry and Pancho Barnes, defendants in the above entitled action are about to appeal to the Circuit Court of Appeals for the Ninth Circuit from judgment of temporary injunction entered in said action on February 15, 1954, in the District Court of the United States, for the Southern District of California, Northern Division.

Now Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Company a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellants that said Appellants will

pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be hereto affixed, this 18th day of March, 1954.

[Seal] National Automobile and Casualty
Insurance Company,

/s/ By William E. Fortney, Attorney-in-Fact

The Premium charged for this Bond is \$10.00 for its term.

Affidavit of Verification attached.

Examined and recommended for approval as per Rule 8. Signed Pancho Barnes, E. S. McKendry, in Propria Persona.

I hereby approve the foregoing bond. Dated the 18th day of March, 1954.

/s/ Leon R. Yankwich,
Judge

[127]

[Endorsed]: Filed March 18, 1954.

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD

Come now the appellants and pursuant to Rule 75 (a) R. C. P., designate the following as the contents of the record on appeal.

1. Complaint in Condemnation.
2. Declaration of Taking.
3. Decree on Declaration of Taking.
4. Motion to Dismiss.
5. Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment entered thereon.
6. Supplemental Amendment to Motion to Dismiss.
7. Supplemental Amendment to Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment.
8. Notice of Motion for an Order of Immediate Possession.
9. Defendant's Memorandum in Opposition to Plaintiff's Application for Order of Immediate Possession.
10. Order to Show Cause Why Temporary Restraining Order Should Not Issue.
11. Reporter's Transcript of Proceedings, Feb-

ruary 5, 1954 pages 1 through 79, Honorable Leon R. Yankwich, Judge Presiding. [128]

12. Temporary Injunction.

13. Defendant's proffered Order Denying Application for Temporary Injunction.

14. Notice of Appeal to Court of Appeals for the Ninth Circuit under Rule 73 (b) and Title 28 U. S. C. A. (Revised) Section 1292.

15. Undertaking for Costs on Appeal.

16. This Designation.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona.

Acknowledgment of Service attached. [129]

[Endorsed]: Filed April 22, 1954.

[Title of District Court and Cause.]

**MOTION FOR EXTENSION OF TIME TO
FILE RECORD AND DOCKET APPEAL
(Rule 73 (g) R.C.P.)**

Whereas it appears that the time within which to file record and docket appeal in the above matter will expire on April 26, 1954 that there is insufficient time and a great distance between the offices of respective counsel preventing physical presentation within the jurisdictional time limits;

Now, Therefore, Defendants respectfully move that the time within which to file record and docket appeal be extended up to and including May 26, 1954.

Respectfully submitted,

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona.

It is so Ordered.

/s/ LEON R. YANKWICH,

Judge. [133]

[Endorsed]: Filed April 22, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 134, inclusive, contain the original Complaint in Condemnation; Declaration of Taking; Decree on Declaration of Taking; Separate Petitions of E. S. McKendry et al for Partial Distribution of Compensation Pursuant to Section 258a, Title 40, U.S.C. filed March 11, 1953 and March 13, 1953 and separate Orders for same; Receipt and Partial Satisfaction of E. S. McKendry, as Trustee; Receipt and Full Satisfaction of

Farmers and Merchants Bank of Long Beach; Separate Receipts of Bureau of Internal Revenue and State of California, Department of Employment; Notice of Motion for an Order of Immediate Possession; Notice of and Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment and Supplemental Amendment Thereto; Motion for Temporary Restraining Order; Order to Show Cause Why Temporary Restraining Order Should Not Issue; Defendants' Memorandum in Opposition to Plaintiff's Application for Order of Immediate Possession; Notice of and Motion to Dismiss; Proposed Form of Order Denying Temporary Injunction; Temporary Injunction; Memorandum of Opinion and Orders; Supplemental Amendment to Motion to Dismiss; Notice of Appeal; Undertaking for Costs on Appeal; Designation of Record on Appeal; Counter-designation of Record on Appeal; Motion for and Order Extending Time to Docket Appeal and Order Extending Time to File Counterdesignation of Record on Appeal and to Docket Appeal which, together with copy of Reporter's Transcript of Proceedings on February 5, 1954, in two volumes, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 3rd day of June, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk.

/s/ By THEODORE HOCKE,
Chief Deputy.

In the United States District Court, Southern District of California, Northern Division

No. 1253-ND—Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

360 ACRES OF LAND IN THE COUNTY OF KERN, State of California, E. S. McKENDRY, FLORENCE LOWE BARNES, etc., et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Fresno, California, February 5, 1954

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiff: Laughlin E. Waters, Esq., United States Attorney, by August Weymann, Esq., Special Assistant, Lands Division. For the Defendants: Mrs. Pancho Barnes and E. S. McKendry, each appearing in propria persona. [1*]

Mrs. Barnes: Your Honor, I haven't quite fin-

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

ished reading this. I did not hear about this until last night. I would like a chance to complete reading it. I believe I know what is necessary, and I believe Mr. Weymann has some witnesses here with him.

Mr. Weymann: I will not need any witnesses, your Honor.

The Court: Just a moment. Let's understand what the problem is. The problem here is very simple, and if you desire time to complete reading the papers, I will give the time. I am calling the session because we have been waiting here since ten o'clock for the purpose of this hearing.

Under the law—and I am making these statements because you are appearing for yourself, otherwise I would not make the statements because you are supposed to know—under the law the Court has the power when application is made to issue a temporary restraining order without a hearing, upon a showing being made. An application was made to the Court to issue a restraining order to prevent you from engaging in construction on this ranch, the title to which has already passed to the Government of the United States by virtue of the declaration of taking and the only question is the determination of the amount you are to receive in compensation.

Because of the nature of the proceeding, and because [2] the courts at times do not desire to issue even temporary orders binding people to do or not to do certain things except after a hearing, I issued an order to show cause returnable this

morning, to be heard by Judge Beaumont or by me. I happen to be here as Chief Judge of the District.

The object of the hearing is merely to determine whether the Court shall issue an injunction, maintaining the condition in which the situation is now, and preventing the construction of any buildings that later on might have to be taken into consideration when the question of value is determined. That is the only question that is before the Court.

The affidavits on which Mr. Weymann based the motion are on file and are attached, and he has the option of presenting them, and if he desires additional testimony he may do so, but that is not necessary. And then you can present such facts or argument as you desire.

So we can start the proceeding and then if you desire additional time, this being the noon hour, we can continue the matter until a later hour in the day at which time the presentation will be completed. We have lost time because of unavoidable conditions, and the Court appreciates the fact that you have kept us informed of your whereabouts, and we have been sitting here waiting.

Now we can do one of two things: I can have Mr. Weymann amplify what I have said as to the nature of the proceeding, [3] make his offer of proof, and then we can continue the matter to a later hour, at which time additional facts may be presented and the rest of the day taken, if necessary, to dispose of the matter.

Mrs. Barnes: Your Honor, I say no affidavits

should be offered into evidence, because it does not give me the right of any cross examination.

The Court: It is permissible in this type of proceeding; affidavits may be offered. This is not a trial. This is merely a question of determining whether a condition exists.

Mrs. Barnes: I think that is a vital thing to determine, because I think the Air Force and Mr. Weymann and the United States Government have been using the course as a means of harassing us.

The Court: I am not interested in any such matter. I am familiar with the record; I know that there is pending before Judge Beaumont the motion for immediate possession, and that certain testimony has been taken. In fact, I looked through the transcript, and there are some depositions that have been returned. Judge Beaumont will determine that matter at the proper time, and I am not going to presume to pass upon any matter that is before him.

This morning the only matter that is before the Court is whether, pending the trial of this lawsuit and the [4] determination of the suit, the status quo should be maintained.

The matter of proof is up to the Court, and it is permissible in a hearing on these matters to allow affidavits to be received, and if it is desired to amplify them, then that can be argued later on.

One thing you must bear in mind, and I wrote an opinion last year to that effect in another case, there is only one issue in a condemnation suit which the person whose property is being taken has a

right to have determined, and that is the amount of compensation he or she is to receive. The question whether the property is necessary or whether other property is available is not a question to be considered.

Mrs. Barnes: I believe there has been a ruling on that, your Honor, to the higher court, in cases of bad faith there is a question.

The Court: That, however, is not a matter before the Court at the present. It is not a matter before me. Judge Beaumont has to decide that question.

I wrote an opinion because a couple of attorneys were questioning the right of the government to take property, which related to certain canals, it was needed for certain canals. I wrote an opinion in which I held whether the property is needed or not is not a question that can be disputed by the courts.

This is merely preliminary, but one thing is this, the [5] Court in any case of that kind has a right to entertain a motion such as this, the object of which is merely to maintain the status quo while the other matters are being determined, and that is the object of this motion.

Mrs. Barnes: Your Honor, I have not had a chance to read the papers, but in what I have read there are several misstatements, and I would like to cross examine the ones making the affidavits because they are not true.

The Court: No testimony has been received as yet. We will get to that at the proper time.

Mr. Weymann: The application is based upon the record before the Court, and upon the affidavits supporting the motion for a permanent restraining order.

The Court: All right. Let us identify the affidavits. Now, you have the affidavit of Lieutenant Colonel Marcus B. Sacks.

Mr. Weymann: Correct.

The Court: And you have the affidavit of Colonel Marion J. Akers.

Mr. Weymann: Correct.

The Court: And the affidavit of Lynn J. Buttane.

Mr. Weymann: That is correct.

The Court: And the affidavits of Irwin H. Smith, and Henry J. Yagel, and then your own affidavit.

Mr. Weymann: That is correct, your Honor. [6]

The Court: Of course, that was made for the temporary restraining order, your own affidavit.

All right, these affidavits which are attached to the petition will be received as part of the showing of the Government upon the hearing of this motion for temporary injunction as prayed for.

Mrs. Barnes: Do you mean when you receive them you believe them to be the truth? There is no question to determine whether or not those affidavits are truthful or not?

The Court: Just a moment. These affidavits are sworn to. When they are received they are presumed to be the truth. They may be contradicted by you by any counter-affidavits you may desire to

file, or by any testimony you may desire to present. All right.

Mr. Weymann: That is the basis for presenting them.

The Court: There is only one question——

Mrs. Barnes: Your Honor, pardon me. Colonel Akers and Colonel Sacks, who made affidavits, are in court. I see no reason why we could not call them as witnesses.

The Court: I will decide later on, if you desire to ask them questions I may decide later whether to allow it. This is not a trial. This is merely a motion and a number of things that are allowed in a trial are not allowed here. I am merely trying to get this started, and you may call them if they are available, call them as adverse witnesses [7] and examine them.

I am familiar with this record. We are very charitable and tolerant as to persons who appear in their own behalf, but I am not going to give you advice as to the law. You are presuming to defend yourself in court as an attorney and the fact you are not an attorney does not carry any prejudice, but I am not answering questions or giving instructions. As a Judge I do not instruct people as to what their rights are, because when a person chooses to be her own attorney she is presumed to know what the proceeding is.

Mrs. Barnes: O.K. Will Mr. Weymann stipulate at this time that these witnesses will appear then as adverse witnesses?

The Court: You have a right to call them. Let's go on. What additional evidence will you have?

Mr. Weymann: None whatever, your Honor.

The Court: Now I am going to continue this until 1:30. We have to double up because we only have one clerk; and my reporter was grounded, her airplane landed in Merced, so I am taking Judge Beaumont's reporter, and I am working everybody in between hours in the hope my reporter will get here. If not, why, the clerk can start us, and he can function in both courts. So we will continue the matter until 1:30.

That will give you an opportunity to examine further these papers and the order to show cause, and at that time [8] I will hear you. You can be sworn as a witness to contradict them, or have anyone else sworn, and if you desire to examine the persons who are here, you may do so under Section 43-b, you may examine them as to any matters contained in the affidavits.

There is only one matter that we will go into, and I want to warn you, we will go absolutely into nothing else. Whether your workmen are about to construct, or are engaged in construction work, that is the only issue before me at this time. I am not interested in any question you raise of good faith because that is not before me. It is a simple matter. If you say you are not, then an injunction cannot hurt you. All this injunction asks is that no construction work be done upon this property which the Government has condemned pending the deter-

mination of the lawsuit and the fixing of the amount you are to receive as compensation.

This is a very simple matter before me and I do not desire to have it complicated by other matters.

Mrs. Barnes: The things in the affidavits are before you, the wording in there.

The Court: The wording is——

Mrs. Barnes: What it says, the contention of their affidavits.

The Court: The contention, and the ground upon which it is asked, the injunction is asked, is merely that you are [9] constructing——

Mrs. Barnes: Your Honor,——

The Court: Just a moment. It is stated in this motion that you are still in possession of the property and that you are completing the erection of certain buildings and improvements. Now, the possession of the property, there is no question you are in possession because the Government has sought an order of possession. They did not take possession and that is still pending before Judge Beaumont. So the only question is whether you are doing any improvement which would afterwards affect the condition of the property. That is all that is before the Court, and the injunction is asked to maintain it in the condition as it is until Judge Beaumont and the jury ultimately decide what compensation shall be received.

That is the question to be decided later on, and the only question before the Court is the very limited question whether you are at the present time

engaged in making changes in the property that should not be allowed to be made, and that is all.

Mrs. Barnes: I am not making this difficult; the Government is making this difficult.

The Court: Just one moment. I have tried these lawsuits for 26 years; I have tried lawsuits of this character. I know how people feel about property. I got through trying one [10] two weeks ago. People have feelings about property. The Government of the United States, the State, county, city, the utility districts, all have the right to exercise eminent domain, and the only thing to be determined is the right of compensation. The fact you do not want the property taken does not make any difference.

I am merely trying to point out to you this is a very narrow hearing, on one issue only, and that is whether work is going on which should be stopped. If it is not going on, if they are mistaken as to what is going on, then you present it, and at the conclusion of the matter I will decide the matter and make findings. But whatever is decided has nothing to do with the suit before the court.

I have not opened the depositions, but the transcripts of the oral hearing are in the clerk's office, and I familiarized myself with them since coming here.

The other matters, of course, were presented to me in Los Angeles, as the Chief Judge of the Court, and I did not issue an injunction, as I have a right to do, a temporary restraining order for ten days. I am here; I am here because Judge Beaumont is

engaged. There are ten judges, and we can sit here, just as we sit in San Diego and in Los Angeles. In fact, I am coming up here on the 23rd to try some cases, and I will try a case here and Judge Beaumont will try another case in another court.

I am explaining this so you will understand this is one of the things that come up regularly.

We will continue this until 1:30, at which time I will hear you further.

(Whereupon, at 12:30 o'clock p.m., February 5, 1954, a recess was taken until 1:30 p.m. of the same day.) [12]

[Endorsed[: Filed February 13, 1954.

Friday, February 5, 1954, 1:30 p.m.

The Court: We will proceed with the further hearing in the Matter of United States against Barnes on the motion for the execution of a temporary injunction pending suit.

Mr. Weymann: The plaintiff has nothing further to offer, your Honor.

The Court: All right, Mrs. Barnes.

Mrs. Barnes: I would like to call Col. Sachs as an adverse witness.

The Court: All right. Col. Sachs, will you come forward and be sworn?

MARCUS B. SACHS

called as a witness by the defendants, under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name, please?

The Witness: Marcus B. Sachs, Lieutenant Colonel.

Mrs. Barnes: Your Honor, I would like to refer to Col. Sachs' affidavit, which is in your file there.

The Court: All right.

Mrs. Barnes: If you would like to find it and follow me [14] with it.

The Court: That is all right. You go ahead.

Q. (By Mrs. Barnes): Col. Sachs, in your affidavit you refer to an Air Force photograph—they say it is an Air Force photograph—in which a certain building is shown marked "B". Do you recollect that? A. Yes.

The Court: Colonel, here is the original.

The Witness: Thank you.

Q. (By Mrs. Barnes): If you will observe lines 27 and 28 of your affidavit there. A. Yes.

Q. Will you read that?

A. "That the building identified and shown on said photograph marked 'B' did not exist at the time of said fire, nor at the time of the filing of the plaintiff's declaration of taking in this action. That as appears from the affidavit," et cetera.

(Testimony of Marcus B. Sachs.)

The Court: She merely meant for you to read it to yourself, because she wants to base a question on it.

Mrs. Barnes: I would just as soon have it in the record.

The Witness: I have read the portion.

Q. (By Mrs. Barnes): Now, you also said earlier in that affidavit that you were familiar with the property. Is that [15] correct?

A. Yes.

Q. Yet you state that this building did not exist until after the fire, the time of the fire; is that correct? A. Yes.

Q. In other words, you weren't very observant, were you, Colonel? A. I was.

Q. You were observant? A. I was.

Q. I would like to show you three photographs here that are exhibits in the case, in the motion to dismiss and the motion to set aside declaration of taking and in the motion of the Government for the order for immediate possession. These are official exhibits in that case.

Mr. Weymann: May I see them, please?

Mrs. Barnes: You have seen them, Mr. Weymann.

Mr. Weymann: I want to see them again, please.

(The photographs were exhibited to counsel.)

Mrs. Barnes: We are referring to the structures. Would his Honor like to see those?

The Court: That is all right. I can see them. Show them to the witness.

(Testimony of Marcus B. Sachs.)

Q. (By Mrs. Barnes): Now, in Exhibit B here, you show this building. Incidentally, this picture is very [16] unfamiliar looking to me. Do you have anyone here to authenticate this picture?

A. No.

Mrs. Barnes: I don't know, your Honor, if this will be permissible in the record. There is no one here to authenticate this picture.

The Court: The affidavit is sufficient identification, and if you want to ask anything further, you can ask the witness if this is a correct representation of what he saw, as stated in the affidavit.

The Witness: I may state I did not personally visit this place. I had been out there before, and I am testifying from having been there before, and from this photograph, and from what people told me who were out there.

Q. (By Mrs. Barnes): In other words, you are not familiar with the property?

A. I am familiar with the property. I have been there. You showed me around.

Q. Is this an official Air Force photograph?

A. Yes, it is.

Q. Who took this photograph?

A. I don't know what pilot by name, but one of our pilots took the aerial photograph of this building on the 29th of January, 1954.

Q. Now, I show you here a picture that is officially [17] in the record. There is a building, and do you see this woman standing here, and this portrays the paved floor, the roof and superstructure

(Testimony of Marcus B. Sachs.)

in here. Could you identify that as being that building? A. Of course it is not.

Q. What do you mean, it isn't?

A. Just what I said, it is not. All I see there are posts. I do not even see a roof. There is no roof there.

Q. Well, there are all the uprights for the roof?

A. There are some posts there. There is no roof.

Q. Do you know what the material is that covers this particular building?

A. I have been told.

The Court: Go ahead and state, so long as she has asked you the question.

The Witness: I have been told it is plastic.

Mrs. Barnes: I object to that myself. He evidently has not seen this.

The Court: You don't know, of your own knowledge, the material from which it was made?

The Witness: No, sir.

The Court: But you state that the picture which is attached to your affidavit shows structures which are not on the photograph shown to you by Mrs. Barnes?

The Witness: That is right, sir. [18]

Mrs. Barnes: That is all, Col. Sachs. Your witness, Mr. Weymann.

Do you wish to ask him anything?

Mr. Weymann: No questions.

The Court: Call your next witness. Oh, just one minute before you go away.

Now, what did you use as your picture?

(Testimony of Marcus B. Sachs.)

Mrs. Barnes: There are other pictures, and they will show the same structures here.

The Court: The main point is that we want to identify what you examined the witness concerning.

Mrs. Barnes: These are from the case.

The Court: But they are not in the record, so they have to be identified?

Mrs. Barnes: Yes, they are in the record, your Honor.

The Court: Where?

Mrs. Barnes: Mr. Eiland, would you explain?

The Clerk: Those are from the first hearing, not this hearing.

The Court: The main point is this: Can you spare these?

Mrs. Barnes: They are already of record.

The Court: But, as I told you, this is a separate hearing, and you have to do one of two things: either put this in as an exhibit of yours in this hearing, or identify it from [19] the other by number, or in some other manner, and do it by reference. It would be easier if you would let this be filed here.

Mrs. Barnes: I haven't got the power to take these, because they are already exhibits in the other case.

The Court: Could you take them out?

Mrs. Barnes: Mr. Eiland loaned them to me.

The Court: They have no number on them.

Mrs. Barnes: There is a big group of them, and they are all put in within one number.

(Testimony of Marcus B. Sachs.)

The Court: Do you remember it?

The Clerk: No, I do not remember the number. I would have to refer to my former record.

The Court: All right. Which of these pictures did you show him?

Mrs. Barnes: I showed that one to him there (indicating). I will explain it all to you, your Honor.

The Court: No, I don't want you to explain. I just want this identified.

Mrs. Barnes: These three all show the structures that this is looking out from.

The Court: All right. Let's mark these as Respondents' or Defendants' Exhibits A, B, and C on this motion, which are a part of whatever exhibit number it is in the other case, if you can identify it. If not, you can supply it for your [20] minutes later, Mr. Eiland.

The Clerk: Yes, I will.

The Court: I am merely trying to get them in without impinging on the other record. Then they are Exhibits A, B, and C in this matter.

(The documents referred to were marked Defendants' Exhibits A, B, and C, for identification.)

The Witness: Is that all, sir?

The Court: Yes. Step down.

(Witness excused.)

Mrs. Barnes: Col. Akers.

MARION J. AKERS

called as a witness by the defendants, under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name, please?

The Witness: Marion J. Akers, A-k-e-r-s.

The Court: Mrs. Barnes, will you please observe the same rules that lawyers observe. We do not allow lawyers to come near a witness unless it is to show him a document. You will have to stay right there, because that is the rule, and when you want to show him a document, you can come up here.

All right, go ahead.

Mrs. Barnes: Thank you, your Honor.

Q. (By Mrs. Barnes): Col. Akers, there have been a great many references in these affidavits to the construction of a new runway. Do you recall those? A. No, I do not.

Mr. Weymann : Just a moment. I object to that as immaterial.

The Court: There is nothing about that in this affidavit. You are evidently referring to matters relating to the other motion, the motion for immediate possession. This does not set that forth, as far as I remember.

Mrs. Barnes: Well, Mr. Weymann made an affidavit there, your Honor, I believe.

(Testimony of Marion J. Akers.)

The Court: You cannot cross examine this witness as to that.

Mrs. Barnes: O. K. I would like, however, to ask Col. Akers:

Q. As Chief of Staff of the Air Base are you able to identify that photograph that was taken?

The Court: Show it to him. Here you are, Colonel.

(The photograph was handed to the witness.)

Q. (By Mrs. Barnes): This is the one right on top.

A. This is the photograph that you refer to?

The Court: The one that has the "B", the letter "B" in ink marked on the structure.

The Witness: I have the photograph here, yes.

The Court: The question is whether you can identify the structure that appears on that.

Q. (By Mrs. Barnes): The question was: Could he identify the photograph?

The Court: Oh, the photograph?

Mrs. Barnes: I want to authenticate the photograph, if possible.

The Court: Yes.

The Witness: I am not sure that I understand the question, your Honor. Identify the photograph?

The Court: Well, does that represent something that you yourself have seen?

The Witness: Yes, it does represent something that I have seen.

Mrs. Barnes: Your Honor, that wasn't the ques-

(Testimony of Marion J. Akers.)

tion. I want to try to identify the photograph. In other words, I want him to tell me who made it, when it was made, and what photograph that is.

The Court: That is not material. It is immaterial to the issues. Any person, given a photograph, whether it is of a person or a place, may testify as to whether that represents what was on the place.

Q. (By Mrs. Barnes): Col. Akers, is that an Air Force photograph?

A. I assume that it is. I have seen it before.

Q. You have seen it? A. Yes.

Q. Do you know who took it?

A. No, I do not know the photographer's name.

Mr. Weymann: Immaterial, your Honor.

Q. (By Mrs. Barnes): Was it taken under your orders?

A. It was not taken under my direct orders, no.

Q. When you say "direct orders," you mean you didn't tell the man that took it to take it, but did you tell the man that told the man on in the chain of command? Did you order that photograph taken? A. No, I did not.

Q. Do you know who did?

A. No, I don't know who ordered it taken.

Mr. Weymann: This is entirely immaterial, if the court please.

The Court: I will allow the question, if the witness who is present can identify it. As I said before, it does not matter who took the photograph. A person may use a photograph that is taken by

(Testimony of Marion J. Akers.)

another, and state that it, in his opinion, represents what was on that place.

Q. (By Mrs. Barnes): Have you seen this structure as [24] noted recently yourself?

A. You are referring to the portion marked "B"?

Q. Yes. A. I saw that, yes.

Q. When?

A. On last Friday, the 29th of January, 1954 I believe was the date.

Q. I believe you described that building in your affidavit. What was the material of the roof on that building?

A. To me it appeared to be this plastic covered screen material. Just what the trade name for it is, I don't know.

Q. I think you said in your affidavit there were other structures there. What other structures?

A. There were studdings, 2 by 6 studdings on the side. There were the 2 by 4—2 by 6 rafters forming a portion of the pitched roof.

Q. Did you measure those?

A. And other portions of plywood.

Q. Did you measure the portions of the plywood structure?

A. No, I did not measure them.

Q. Was that new structure or old structure?

A. The studding on the roof for the rafters?

Q. Yes, the beams.

A. Well, what portion? What roof do you refer to? [25]

(Testimony of Marion J. Akers.)

Q. Well, the part that holds up the roof, there are uprights, and then there is a roof. Was that old, or was that new?

A. Well, there was the rafters.

Q. Were some old and some new?

A. Some appeared to be old. Some appeared to be new.

Q. Did you notice the size of what appeared to be new? In other words, what I am trying to get at is, was that a large structure, or was there sufficient wood to hold up plastic lath?

A. I assume you are referring now to the roof structure, the rafters?

Q. Well, I am referring to the plastic glass on the roof, and what holds it up. You have mentioned something about 2 by 6's.

A. Studdings.

Q. Studdings. And I asked you if you measured them.

A. That I believe is a statement, not a question.

Q. I said, did you measure them.

A. No, I did not measure them.

Q. In other words, you are just making an estimate; is that right?

A. I have been around lumber long enough so I recognize a 2 by 6 when I see it.

Q. Col. Akers, were you present—— [26]

The Court: Just a moment. Let me ask you this: You say it looks like plastic glass. Is it **what** they call celloscreen, screen that is merely covered, or is it plastic glass, that is, that has more width? Or did it look like ordinary window glass?

(Testimony of Marion J. Akers.)

The Witness: Your Honor, my statement was—I said it appeared to be plastic covered screen.

The Court: Cello-screen?

The Witness: I don't know.

The Court: I know what that is, because I have worked with it.

The Witness: It may be. I don't know.

The Court: In other words, it was an ordinary screen over which there was plastic——

The Witness: Translucent material.

The Court: ——or over which translucent material is put on, and it keeps the rain out, but doesn't keep out the air?

The Witness: That is right.

The Court: All right. Then we are both talking about the same thing.

Q. (By Mrs. Barnes): Did you notice the floor in that building? A. Yes.

Q. Did that appear to be a new floor?

A. No, it appeared to me to be concrete slab that had [27] perhaps been there for some time. How long, I wouldn't estimate, but it didn't appear to be new.

Q. The wall of that building,—for instance, the wall on the west side, did that appear to be a new structure?

A. The portion of the building that you refer to on the west side, the west wall, appeared to me that you were making use of some sort of it. That had been there for some time as that side of the building.

(Testimony of Marion J. Akers.)

Q. And the south end of the building?

A. The south end of the structure was, as I recall, the portion of your other facility there,—the house, the diningroom, the bar, and kitchen, and so on. That was tied into the structure there.

Q. In other words, from the way you describe it now it appears to you like structures there that would be an expensive thing for the Air Force to have that demolished, if necessary? Is that true or not,—referring to the new part?

A. We come to a question of the definition of “expensive.”

The Court: I don’t think that is the question. The question is the addition of any structures that would have to be considered by an appraiser in determining valuation, and if it has any value at all, that would be a material matter to consider on a motion like this. It does not make any difference whether they can break it down. [28]

Mrs. Barnes: I am not sure, your Honor, that I understand the situation.

The Court: That is the trouble.

Mrs. Barnes: Wait just a minute. I am not sure that you understand the situation. I think I do.

The Court: Don’t worry about me. I probably understand it too well.

Mrs. Barnes: There was a condemnation case filed on January 27th.

The Court: That is right.

Mrs. Barnes: And there was a declaration of

(Testimony of Marion J. Akers.)

taking I believe signed by your Honor two days later.

The Court: That is right.

Mrs. Barnes: Or, no, it was filed simultaneously on the 27th. Then your Honor I believe signed an ex parte judgment on the condemnation suit.

Now, there has been a motion to dismiss, a motion to set aside the declaration of taking and vacate that ex parte judgment, and there is a motion for the possession of the property.

Now, as I understand it, should these motions be tied, that is, the motion to dismiss and the motion to set aside the declaration of taking, be tied before the court in which that case is pending? The question of value does not enter into anything that I might put there for temporary use, because [29] the value would be considered as of the time of condemnation.

Is that not so, your Honor?

The Court: I am not answering questions, Ma'am. I warned you in advance that I am not answering questions.

Mrs. Barnes: All right.

The Court: However, I want to tell you that no judgment was entered. What I entered was the decree which the law authorizes me to enter. It is a decree on the condemnation of taking, the object being to fix the time the property passes into the hands of the Government. By the declaration of taking it automatically passes on, but this decree merely helps to fix the time, and that is the type of

(Testimony of Marion J. Akers.)

decree which I have been entering ever since I have been on this court, and before that time I entered them when I was on the Superior Court in condemnations instituted by public bodies. So no ex parte judgment was entered, and that is the kind of a decree it is.

Q. (By Mrs. Barnes): Col. Akers, I would like to show you these three pictures. They show, as you described it, I think, that there are the up-rights. Is that correct?

Will you name what is there? Maybe you can see them better.

A. I don't see it from here. This portion that you pointed to here earlier had—I would estimate them to be 10 by 10 timbers, the up-rights, supporting an upper framework. [30]

Q. An upper framework. And how about the walls there?

A. Well, this wall here to which I point, which you refer to as the west wall of the building——

Q. Yes.

A. ——was the one I made reference to, which I said to me appeared to be a wall that had been there for some time, and you were making use of that.

Q. And the south wall?

A. The south wall,—from this photograph, I would say this apparently is the north end, the northeast end of your building.

Q. Here it shows again, a part of the same

(Testimony of Marion J. Akers.)

structure. In other words, you do not believe that to be an entirely new structure?

A. The building marked "B", Exhibit B in the photograph is, in my opinion, a new structure, which is making use of upright timbers and supported framework that had been there previously.

Q. Including walls?

A. Including a wall, or two walls possibly, and a prior concrete slab.

Q. Now, there is one other thing I would like to straighten out for the court's benefit. How far does the present runway, the new runway under construction——

Mr. Weymann: That is objected to as entirely immaterial, [31] and having no bearing on this motion.

The Court: The objection will be sustained.

Mrs. Barnes: I want to make an offer of proof, your Honor.

The Court: Go ahead and make your offer of proof.

Mrs. Barnes: It is stated in these affidavits that my buildings and structures are in the way of the extension of this runway, and the ordinary construction of the runway, in several places.

Your Honor, it was brought out very clearly in this same case that the Air Force hasn't got any intentions whatsoever of constructing any runway.

The Court: I am not going to go into that on this matter.

Furthermore, I call your attention to the fact

(Testimony of Marion J. Akers.)

that the only judgment that exists in this case is a judgment which was entered after you joined with others in a petition to partially pay you almost \$200,000, or to pay to certain people some \$200,000.

Mrs. Barnes: Your Honor, I think you have mistaken those dates.

The Court: Yes, the dates are March 10, 1953.

Mrs. Barnes: You will find the judgment that you signed was in February.

The Court: That was not the judgment. It was the judgment [32] on the declaration of taking.

Mrs. Barnes: Yes, the judgment itself was signed before we were notified.

The Court: There is no judgment. There is no judgment at all. That is not a judgment. That is an order which the court is allowed to make, and no notice is provided to anybody, because the law so states. There is no ex parte judgment. I do not want the record to show that any judge of this would enter a judgment without a hearing. I am even giving you a hearing on this, to which you are not entitled. I could have issued an injunction for 10 days, without any hearing, and I didn't do it, so I know what I have done. The decree on the declaration of taking is not a judgment. It merely confirms the fact that the property has been taken by the Government, and the law says that the moment the declaration of taking is filed the title to the property passes to the plaintiff, and the decree of the court is merely made for the purpose of

(Testimony of Marion J. Akers.)

fixing the time. That is for the reason that many a time the time is hard to fix. For instance, in 1942 some people in Fresno, who had a ranch opposite the college went away over the week-end. They had some ten to twenty acres, and when they came back they found guards placed there by the Army. In the meantime the Government had filed a condemnation case and had taken over the property, and had placed the guards there, and the place was [33] being used to locate the Japanese who were being interned at that time.

Now, they did not ask for any order of court because the declaration of taking automatically transfers it. Yet when we tried the case, because there was no order of court, we were not sure as to what date possession was actually transferred. So we had to have an agreement on a date on which the soldiers took possession.

Now, to avoid situations like that it is customary at the present time for the Government to come into court the moment the declaration of taking is filed, and to ask for a decree on the declaration of taking, which merely confirms that the Government has taken the property by the declaration of taking. While the wording is, "It is ordered, adjudged, and decreed," it merely confirms what by statute the filing of the complaint has already accomplished.

All right, you may go ahead.

Mrs. Barnes: I think that is all, Col. Akers.

Mr. Weymann: No questions.

(Testimony of Marion J. Akers.)

The Court: All right. Step down, please.

(Witness excused.) [34]

Mrs. Barnes: Col. Yagel.

The Court: I will swear you. The clerk had to go. And then if you will state your name for the record.

HENRY W. YAGEL

called as a witness by the defendants, under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

Direct Examination

The Witness: Henry W. Yagel, Lieutenant Colonel, U. S. Air Force.

Q. (By Mrs. Barnes): Col. Yagel, you made an affidavit to the effect that the building was not in existence during and immediately after the fire which occurred on November the 14th at the ranch?

A. That is true.

The Court: Here is your affidavit. It is a very brief affidavit.

(The document was handed to the witness.)

Q. (By Mrs. Barnes): Are you familiar with the premises? A. I was from that date.

Q. From what date?

A. The date of the fire, the 14th of November, 1953.

Q. When were you at the premises and looked at this [35] building?

A. As the fire marshal of the Air Force Base,

(Testimony of Henry W. Yagel.)

I responded to the fire call on the 14th of November, and as of that date I stated that the structure was not there.

Q. When you state that a structure is not there, you mean there was nothing there?

A. The structure that I referred to is the one in question now. That did not appear on the date of the fire.

Q. It wasn't there?

A. No. Some of the—go ahead. Ask your question.

The Court: You go ahead and finish your answer.

The Witness: What I was going to state is that the existing structure in question is making use of some of the buildings that were there, possibly.

Q. (By Mrs. Barnes): How much of the buildings that were there, possibly?

A. That I wouldn't want to answer, because I feel that the structure was not completed to a point that I have any idea as to what you intended to do, or what anybody else may have had an intention of doing.

The exterior walls that were there at the time of the fire may be used as a part of the new building that I have seen recently.

Q. When you say "building," what now constitutes the building versus what constituted the building at the time of [36] the fire?

A. I don't know whether I get your question just clear enough.

Q. Well, what was there at the time of the fire?

(Testimony of Henry W. Yagel.)

You have stated that there was no building existing there. Now, what was there at the time of the fire?

A. Well, you had a building that was apparently a dining-room, and led off into another building, and then there was the pool with a considerable paved area around the pool. That was in existence at the time of the fire.

Q. Regarding the building in question, were there any walls or uprights or overhead rafters?

A. There were no rafters or structures that were there last week.

Q. I want to show you these pictures that are an exhibit. Would you say that this was the area in question (indicating)? A. Yes.

Q. These pictures were taken prior to the 27th of November, sometime before then. This present so-called building that you are referring to, would this be the south wall (indicating)?

A. It could be.

Q. Would this be the back wall?

A. It could be. [37]

Q. Would this be the uprights?

A. It could be.

Q. Were these the cross members?

A. It could be.

Q. Was that area paved?

A. That area was paved. There has been a considerable modification, though, since then.

Q. When you say a considerable modification, what do you mean?

(Testimony of Henry W. Yagel.)

A. There was an exterior wall put up, framed with 2 by 6 studdings. This roof has been framed with a hip roof, roof rafters. The roof has been covered with the construction material of plastic-covered roofing material, such as you were using as a roofing material.

Q. In other words, there is a roof and certain filling in along the edges; is that correct?

A. Yes. At the time of the fire I would say it was possible to circulate about the pool. At this time it is impossible to circulate about the pool. The new structure has stopped the circulation that may normally have existed.

Q. In what way would it stop it?

A. The construction has been put up and extended to the extent to which it is impossible to circulate about the pool, as you could previously.

Q. What is stopping you from circulating? [38]

A. This new structure that is going up, and this studding that is filling in on the side.

Q. Did you walk into this structure?

A. Yes. When, may I ask?

Q. The other day when you were there?

A. The other day, yes.

Q. You walked around it?

A. No, I could not walk around it.

Q. You could not walk through it?

A. I could not walk around it; because of the obstructed passage around the pool, you would have fallen in the pool.

Mrs. Barnes: All right. That is all.

(Testimony of Henry W. Yagel.)

Mr. Weymann: No questions.

The Court: All right. Step down.

(Witness excused.)

Mrs. Barnes: Mr. Weymann, will you please take the stand?

AUGUST WEYMANN

called as a witness by the defendants, under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

The Clerk: Your name is?

The Witness: August Weymann. [39]

Direct Examination

Q. (By Mrs. Barnes): Mr. Weymann, did you make an affidavit in this present hearing?

A. I did.

Q. Will you please refer to that affidavit as soon as his Honor is through?

The Court: Here it is.

The Witness: Oh, I have it right here.

Q. (By Mrs. Barnes): Will you refer to page 2 of your affidavit, lines 10 and 11. I haven't got a copy, but if you will please read them so my question is in the record.

A. 9, 10, and 11. "That thereupon and thereafter, and pursuant to petition to this court made by E. S. McKendry, Florence Lowe Barnes, also known as Pancho Barnes, and William Emmert

(Testimony of August Weymann.)

Barnes, as the ostensible former owner of said lands,"——

Q. Wait a minute. Is that page 2 of your affidavit? A. That's right.

Q. Lines 10 and 11?

A. That's right. Lines 10 and 11 would not make sense unless you read the preceding portion.

Q. I believe there is another affidavit, is there not? You are talking about——

A. My affidavit?

Q. You have another affidavit here, have you not? [40] A. No, I have not.

Mrs. Barnes: I have got the lines wrong then.

The Court: This is the only affidavit. There is a motion and a petition signed by Mr. Weymann, but not an affidavit. It is not an affidavit. This is merely the grounds for the motion. Is that what you refer to?

Mrs. Barnes: The grounds for the motion. Then possibly what I am interested in is if they are made on these grounds. That is very pertinent.

Q. (By Mrs. Barnes): Will you please read from lines 7 down through 11? That will be far enough to put over the point I am trying to make.

A. I have read them.

Q. Will you read it out loud, please, so that his Honor and the clerk may get it?

A. Well, it is a part of the record. If the court wishes me to read it, I will.

The Court: Go ahead and read it.

The Witness: "That the continuation of said

(Testimony of August Weymann.)

acts by said defendants will cause immediate and irreparable injury, loss, or damage to the United States of America, in that it will be put to additional expense for the removal and demolition of said buildings and structures on said land, in order to construct the airplane runway for which said property was acquired.” [41]

Q. (By Mrs. Barnes): Mr. Weymann, you know something of the plans of Edwards Air Force Base?

A. Nothing except what I have heard in the testimony of the various hearings held in this matter, and because of maps and records and the usual data which is furnished to the office of the Attorney-General by the acquiring agency.

Q. Would you say that the ranch, my ranch and any structures on it would have anything whatsoever to do with the construction of the present runway?

A. I have no opinion on the subject, because I do not feel competent, and it is not my business to determine that.

Q. But you stated that in a motion here to the court.

A. I didn't state it in the motion to the court. The motion was based on the representations of the acquiring agency.

Q. Don't you feel that the court might be misled by statements like that? A. I do not.

The Court: I want to call your attention to the fact that this is a motion for a temporary restraining order which I did not issue.

(Testimony of August Weymann.)

Mrs. Barnes: There is also on lines 22 and 23——

The Court: But in lieu of that I issued merely an order to show cause.

Mrs. Barnes: That is what we are doing. I want to refer [42] to lines 22 and 23.

The Court: Let's not argue with counsel. When it comes time for the arguments, he can make his argument, and you can make yours.

Mrs. Barnes: He has made a statement, your Honor, that we knew something; in other words, it was our knowledge. This is something that is definitely not a fact, and I don't want your Honor to be misled by that.

The Court: Don't worry. I am not easily misled.

Mrs. Barnes: Very well. That is all, Mr. Weymann.

The Court: Step down.

The Witness: Thank you.

(Witness excused.)

Mrs. Barnes: Mr. McKendry.

EUGENE S. McKENDRY

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Eugene S. McKendry.

The Court: Now, unless you are going to show

(Testimony of Eugene S. McKendry.)

this witness photographs or documents, I am going to again insist that you be seated. Otherwise, you cover the reporter and [44] it makes it very difficult to hear.

Mrs. Barnes: I am sorry, your Honor.

The Court: If you were on the witness stand, you would probably object to it. I know many women who are witnesses do, and so do men.

Mrs. Barnes: I am sorry.

Q. (By Mrs. Barnes): Are you a defendant in this case? A. I am.

Q. How long have you known the property in question? A. Eight years.

Q. Will you please state how long the present structure referred to here has been erected, approximately, of your own knowledge? How long has it been there,—of your own knowledge, in other words?

A. When I arrived at the ranch over eight years ago the walls of this present structure referred to as "B" in the photograph were there, and on my first year at the ranch the floor was put in, so the floor is approximately seven and a half years old.

The rest of the structure, the 12 by 12 heavy timbers that are 42 feet long, or 43 feet long, and the poles have been in place for approximately a little more than two years. That is the heavy timbers, the upright poles. And quite a lot of the cross rafter structure has been there approximately more than two years. [45]

(Testimony of Eugene S. McKendry.)

The Court: What, if anything, has been added since this action was filed? You see, I worded it "if anything," so I don't assume that anything was added. The date of the filing of the action was February 27, 1953.

The Witness: Just the plastic glass has been added.

The Court: At the top?

The Witness: At the top.

The Court: Covering——

The Witness: Covering the roof.

Q. (By Mrs. Barnes): Weren't there some beams to the poles that were already put in there?

A. Yes, there were 6 by 6 cross beams across the top of the heavy timbers that were at the top of the building. The building had been in use for, as I say, a couple of years.

The Court: Without a roof?

The Witness: It had a partial roof on it, your Honor. It was a sunshade roof.

Q. (By Mrs. Barnes): In other words, one sunshade roof was replaced with another sunshade roof?

A. Yes. The other one was not waterproof, and this plastic glass was substituted to make it waterproof.

Q. To clear up the kind of material. I believe it was testified it was screen. What type of plastic glass does that consist of?

A. I believe you call it Cello-clear or Cellocose. It [46] is a quarter-inch mesh nylon fibre screen

(Testimony of Eugene S. McKendry.)

with the plastic embedded or sprayed on, and it is waterproof.

The Court: That is right. It looks like a screen and let's the light in but doesn't let the water through?

The Witness: That's right.

Mrs. Barnes: Your witness, Mr. Weymann.

Cross Examination

Q. (By Mr. Weymann): Mr. McKendry, isn't it a fact that plywood sheathing forming a wall with openings on the side next to the swimming pool was constructed there after the Government acquired title to the property in February, 1953?

A. A small part, yes.

Q. Isn't it true that the rafters were put up on the building? A. A small part, yes.

Mr. Weymann: That is all.

The Court: All right, Mr. McKendry. Step down.

(Witness excused.)

Mrs. Barnes: I could put myself on the stand, your Honor, to bring out the facts of the case.

I would like to make a stipulation in writing, if it would satisfy Mr. Weymann and the Air Force, that we will construct nothing that will in any way be of any cost to them to demolish [47] or tear down anything that we may put up, such as a sunshade, or that we will remove it at our own expense.

I think that this has been a tempest in a teapot, and much ado about nothing, and I believe it is

meant to use the courts more to harass me than a matter of justice, because I think you can see from their own testimony and from ours that there has probably been \$100 or so worth of work put in, plastic glass and some used lumber, and a few pieces we had to hold the plastic glass, little strips to put over the structure that was there, and I don't see where——

The Court: Now, let's proceed regularly. You have had Mr. McKendry testify.

Mrs. Barnes: I would be very glad to take the stand, if a stipulation is not acceptable.

The Court: It isn't necessary. As far as a stipulation is concerned, it is up to counsel to say whether he will accept the stipulation.

Mr. Weymann. The stipulation is rejected and the Government objects to any improvement or any change in the status of the property.

The Court: Then let us go on. The Government will not accept the stipulation. If you desire to go on to add further details relating to this matter, all right, but let's not go beyond the matter before us. Do you desire to take the stand?

Mrs. Barnes: I do, your Honor. [48]

FLORENCE LOWE BARNES

(Pancho Barnes)

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your name for the record?

(Testimony of Florence Lowe Barnes.)

The Witness: Pancho Barnes. On November 14, 1953, there was an incendiary fire and an explosion which demolished the dance hall, my own house, and everything I had in it, the chicken coops and a summer kitchen.

We had previously advertised that we were going to have a dance on December 2nd, and about two weeks before that date a fire was started in that building, and it would have had to be a set fire because otherwise it could not have occurred. There was nothing there to start a fire.

I wished to have a little more room on the place there during the wintertime where people could get out in the breeze. My husband and I took a structure that was already there on the place, that consisted of a concrete floor and walls on the west side and on the south side, and actually there was a wall on the north side, and also a part of a wall which consisted of a bunkhouse, and all that there was there.

There were large poles, very heavy poles holding up great beams, and there were cross beams. We decided that the wall was a good windbreak, and that people could swim, and [49] could dance there in the evening if we protected the place from the wind. And, consequently, we wanted to do it very inexpensively, and we put on the building the plastic glass, and we framed in the front of it, intending also to put plastic glass down the front side of it.

We did have in mind at one time putting a fireplace in, but as the spring and summer is coming

(Testimony of Florence Lowe Barnes.)

on very rapidly, we abandoned that idea. So that the building actually at this time is as complete as it will ever be, except possibly for the addition of some paint, which would just make it look a little better. And that is the extent of the situation.

We have not made any move to rebuild or construct the buildings that have burned down, or any other building in the guest ranch, just for the reason that we realized that in the event that the motion to dismiss this case or the declaration of taking be set aside, and the condemnation suit would be, that the value would be set at the time of condemnation, and any money we would put in we would lose; and it was far more interesting to us to save that money than anything we might build that the Air Force would have to tear down at any expense on its part.

The Court: Is this where the old Air Academy used to be?

The Witness: It was. I trained students there.

The Court: During the war for the English?

The Witness: No. That was the War Eagle just west of Lancaster.

The Court: Where is this?

The Witness: This was where I was training students for civilian pilot training, your Honor. This is east of Lancaster.

The Court: Oh, I see.

The Witness: East and north.

The Court: I ask that because I handled a law suit involving—what was the name of the major

(Testimony of Florence Lowe Barnes.)

who owned that academy after the Government gave it up? What was his name?

The Witness: I don't remember.

The Court: Do you, Mr. Weymann?

Mr. Weymann: I don't know.

The Court: Oh, they trained British pilots during the war.

The Witness: Oh, Major Moseley.

The Court: Yes, Major Moseley. That is not this place?

The Witness: No, that is not my same place. That is west of Lancaster.

The Court: I see.

The Witness: This property that the Air Force is taking in the expansion of the field is on to the east of Lancaster.

The Court: I just wanted to locate the property, because [51] I have been on that Moseley property several times, and recently I had a law suit involving the various corporations that Major Moseley formed, and all these operations were described, and I wanted to know where it was located with reference to that. That is all right.

The Witness: I knew Maj. Moseley very well. I flew for him at one time.

The Court: I see.

The Witness: Regarding the situation, your Honor, we are not interested in putting any money in that we won't get out. That is only reasonable.

The Court: This is argument. Let's finish with

(Testimony of Florence Lowe Barnes.)

your testimony, and then I will let you argue the matter.

Mr. Weymann has a right to cross examine you, and then if he does not offer anything, I will hear argument on both sides as to what, if any, process should issue, and, if so, what it is to be limited to.

Have you finished your statement as to what changes have been made?

The Witness: It was merely taking the structure that was there.

The Court: As I understand it, you have already done it, except possibly for some painting?

The Witness: Painting, that is right.

The Court: All right. Mr. Weymann, any questions? [52]

Cross Examination

Q. (By Mr. Weymann): Are you going to put in any windows?

A. We already have the windows, Mr. Weymann.

Q. When did you put them in?

A. They aren't in, but we have them. They are on the place, and we have those windows. We already had them in other buildings.

Q. It was the dance hall that burned down?

A. The dance hall, and my home, and the chicken yard and the summer kitchen.

Q. And this structure which is the subject of this motion you intend to use for a dance hall; is that correct?

A. Not entirely, no.

Q. Partially?

(Testimony of Florence Lowe Barnes.)

The Court: In December of what year was that fire?

The Witness: Oh, it was just last November, November 14th.

The Court: November of last year?

The Witness: Yes, sir.

The Court: I see. Go ahead.

Mr. Weymann: I think that is all.

The Court: All right, Mrs. Barnes, step down.
(Witness excused.)

The Court: Anything further by way of evidence? If not, [53] I will hear any argument you desire to present.

Mrs. Barnes: I am through, your Honor.

The Court: Mr. Weymann?

Mr. Weymann: Nothing further by way of evidence, your Honor.

The Court: All right. I will hear any comments you desire to make.

Mr. Weymann: I think the testimony of the defendant, Mrs. Barnes, clearly sustains the Government's motion. All of the testimony the plaintiff adduced here this afternoon goes to the matter of the result that has been performed, and not to the fact that there have been improvements made of that property and that there have been previously available materials used to complete that structure to the extent that it has been completed.

Our position is this: that the Government, as the owner of that property, has the absolute right to have the status quo maintained until the determin-

ation of this action. Not only because of the expense, whether it be great or small, in demolishing these structures eventually, but because of the difficulty of having a proper appraisal made.

I think it is elementary, and I need not argue with your Honor on that point, that the owner of the property has the right to determine what should or should not be done with it, and it is on that basis that we ask that these [54] defendants be restrained from in any way changing the character or the condition of that property.

The Court: All right, Mrs. Barnes.

Mrs. Barnes: I am very, very glad, your Honor, to make a stipulation in writing that we won't change the character of the property, and that we are not trying to do anything that would in any way cause the Government expense or inconvenience. And I think I should not have objected to have an injunction put against me, but I feel it unnecessary, and I will be very glad to make a written stipulation that I will not cause the Government any expense. As far as this very small project, it certainly has cost far less than Mr. Weymann's salary, and the salary of the Air Force officers, and your time and the clerk's time, and the reporter's time, and everybody that is here.

We are all down here on a very, very small item, and it seems to me it is very unnecessary, your Honor, and very unfair.

As far as the statements in the affidavits on the motion there of Mr. Weymann, that the place is necessary to construct a new runway, that is ab-

solutely untrue, and that all came out in the past testimony, and is of record under oath.

As far as the runway is concerned, we know it is never going to be there, and the Air Force wants this property——

Mr. Weymann: If the court please, while this is argument, [55] I doubt very much if it is a proper form of argument. As far as the runway is concerned, we are not concerned with that now.

Mrs. Barnes: You have made those statements, Mr. Weymann, and they are allegations in your motion.

The Court: All right, Mrs. Barnes.

Mrs. Barnes: That all came out in the case.

Another thing, too, your Honor, we have a case before the court.

Now, you stated your opinion regarding condemnation cases, and the necessity of the Government, and in the main I think that that is quite all right. But there is always an exception to every rule, your Honor, and as far as this case is concerned, we have, I believe proved bad faith, and we have also proved lack of necessity, and there are rulings already on that.

Furthermore, we have definitely shown a prima facie case that the amount of money deposited was not correct. It very well may be that the honorable judge on this case might uphold my motion to dismiss the case and set aside the declaration of taking, and in the mean time, until that case is decided, and in the event that he does not grant my motion, and does make an order to the Government

for possession, at some time or another there still is a condemnation case to be heard. [56]

And, your Honor, from the stand and in this case, you can find in the record and in the testimony that their own witness, the chief of installations, Col. Miller from Baltimore, definitely stated it would be the end of December of this present year, 1954, before they expected to have any of this runway completed, or in any way could use the property here in question, and according to the way the work is going, I doubt very, very much if it will be by the first of 1955 before anything is available.

In the meantime, your Honor, I pray that you do not grant an injunction against me. I am willing to sign any stipulation that is just and proper, and agree that I will not cost the Government any money. But I believe, your Honor, that they are not trying to stop me in construction, and they are not worrying about how much money they cost the Government, any of them, because there have been things that have showed up that prove they are not worried about the cost to the Government.

What they are anxious to do is to try to hamper me in anything I might do to keep myself going until these affairs are settled, and I do have a heavy overhead.

The Government has put me in the position, your Honor, of forcing me to fight. I had a ranch there, a large establishment of a hotel, a bar, a restaurant, of being in the hog business, the horse business, the cattle business, and [57] fields, and an airport,

and a very, very large place, on which I turned down on two separate occasions a sum of a million and a half dollars for.

There were over 40,000 square feet of buildings, including this building they are making such a fuss about today on those premises previous to the fire, and at the time of condemnation, and yet they only put up the infinitesimal sum compared, of course, to to the project and the moving of it, of \$205,000.

The Court: The Government is good for any balance there might be.

Mrs. Barnes: That may be true.

The Court: Many a time the Government forms its own estimate, and later on when a judgment is secured, we make an order ordering the Government to furnish the additional amount.

I tried a case, and Mr. Weymann was in it, which was tried before a jury week before last, and in one instance the award was some \$20,000 more than the highest appraisal by the Government, and in the other it was only about \$1500 higher. If there isn't enough money deposited in the entire condemnation suit to cover everything, an order will be made ordering the Government to put it in. And that does not obtain as to the Government of the United States alone. Under the laws of California, the same happens if the County should [58] want your property. They go in, form an estimate of the amount, make a deposit, and take possession immediately, and then if there isn't enough, then later on when the actual award is

made, the Government,—the State Government, City, or County, must pay the balance.

Mr. Weymann: I might add that in this case \$194,000——

The Court: Has already been paid?

Mr. Weymann: ——has already been paid to this date.

Mrs. Barnes: Without prejudice. Mr. Weymann stipulated that, that that is without prejudice. He is always dragging that in. I wish I could move your Honor——

The Court: Well, if the judge were to dismiss the suit, he would order you, before he entered the dismissal, to return the \$194,000, and he would have to make that as a condition precedent.

Mrs. Barnes: That would be a very fine thing. What I am trying to say is they put me in a position in which it is impossible for me to move 40,000 square feet of buildings, two race tracks, livestock, fences, and various miscellaneous buildings, as well as irrigation systems, pumps, and so forth. They put me in a position where I could not move.

There are cases on that, your Honor. There is one case, for instance, I know, *United States vs. 40 Acres of Land in New York State*, where the Air Force put up \$200,000, when they had already talked about paying \$500,000, and the court there [59] set aside the declaration of taking and vacated the ex parte judgment the Air Force got.

The Court: I am not interested in what the judge there did. I am interested in this particular case.

Mrs. Barnes: When the property is taken, and the property has been taken by the Government, and when sufficient compensation is not put up, then it is against the Fifth Amendment of the Constitution, your Honor, to do it.

The Court: All right.

Mrs. Barnes: They say that has nothing to do with this case. What I am saying now is I am very willing to stipulate in writing——

The Court: They are not willing to accept it, so there is no use in repeating it, and I shall have to rule on the matter.

Mrs. Barnes: Well, I have done nothing, your Honor, and they have proved nothing.

The Court: Let's have some order here. It is their motion, and they have the beginning and the ending.

Have you finished now?

Mrs. Barnes: No. I think you have already made up your mind, probably before this case started, and that is to issue an injunction against me.

The Court: Please sit down now. You have finished your argument. [60]

Mrs. Barnes: Can I have a rebuttal then?

The Court: No, because it is their motion. They have the right to open, you see, and they have the closing.

Mrs. Barnes: May I say one thing,——

The Court: No, please be seated.

Mrs. Barnes: ——and no more.

The Court: No, because you are treading on dangerous ground. I may have to send you to jail

if you insist on that type of statement for contempt of court. I haven't made up my mind about this matter. If I had made up my mind, I could have granted an injunction in this matter. I did not do so.

It is unfortunate that in many of these cases so much feeling goes into these matters, and it will crop out. People are attached to property, and they don't want to sell, and much sentiment is brought in, which unfortunately has no place in these cases. This isn't the only such case. In many cases they say they don't want to sell at any price, that they are happy, that their property was not for sale. But the fact remains, as I have said before, that the power of eminent domain is one of the greatest powers of Government, and without it the Government could not exist. And when I say "the Government," I mean Government in the general sense,—the Federal Government, the State Government, the County Government, the City Government. [61]

I happen to have been a judge of the Superior Court of Los Angeles County before I became a judge of the Federal Court, just as Judge Beaumont was a judge of the Superior Court of Fresno County before he became a judge of the Federal Court, and we have conducted trials and we have set in judgment in these cases, and we try to limit them to the only issue that exists under the Constitution.

The Constitution says that private property shall not be taken for public use without just compensa-

tion, and the Supreme Court of the United States has decided in dozens of cases that the only right that the property owner has is the right to receive just compensation for his property, and that is all that is involved.

As a matter of fact, years ago in California a litigant could dispute with the Government whether the property was needed for an improvement and whether, for instance, the taking was as it should be. To illustrate: If, for instance, the County of Los Angeles wanted property for a road, and they took the property from one side of what had been a road before, the property owner could come into court and for weeks put his engineers on the stand and try to demonstrate to the jury and to the court that they did not need the property, or that they could get it elsewhere. So the legislature of California passed a law, which is identical with the law of the United States, which says that when a [62] declaration of taking is filed, when a complaint is filed and money is deposited, that the title to the property passes immediately, subject to the right to have determined, either by arbitrators or by the court, the value of the property.

The law also says that the passage by the administrative body, that is, by the board of supervisors or the board of city trustees, or whatever you may call them, the city councilmen, of any ordinance of intention shall be conclusive proof, first, that the property is needed and that the purpose is a public purpose, and, secondly, that the taking in the manner described by the Government is a

proper taking. That is also the law of the United States.

I filed an opinion here last year in a series of cases involving Friant Dam and the property needed for a canal, in which I stated that those principles applied; that the owners cannot come in and tell the Bureau of Reclamation whether they needed the property for canals or not, or whether they should be taking that property or not.

Now, to get back to the State. There was a woman who owned a tremendous amount of property, and she was just as proud of her property as Mrs. Barnes is of her property here. Her name was Rindge, and she owned the Malibu Ranch, all of the property from the foot of Wilshire Boulevard up to Oxnard in Ventura County. All that Malibu Ranch was her own property, the result of an old grant. [63]

The County of Los Angeles brought suit under this new law. Mrs. Rindge was dissatisfied. She did not want the property taken. She did not care whether Malibu Road was ever opened, or whether you could get through there. She said, "I want to keep my property intact. I want to keep the people out."

She went to the Supreme Court of the United States, and she complained of the fact that she was deprived of due process because of not being allowed to contest with the State Government or the County Government the question of whether the improvement was needed, the question of whether the property should be taken, and the manner in

which the property was taken. She said her constitutional rights had been invaded.

The Supreme Court of the United States held that the only thing she was entitled to under the Constitution of the United States, or under the Fourteenth Amendment, which makes the due process clause of the Fifth applicable to states,—that the only thing she was entitled to was to prove to a court or jury the just compensation to which she was entitled; that the legislature had a right to say that whenever a certain thing is to be done, it shall be conclusive proof that the County agency or the State agency needs it.

Now, the federal law is identical with that, and the Supreme Court has had occasion to pass on it repeatedly, as I [64] pointed out in this opinion filed about a year ago. I think it was last February I filed it.

Mr. Weymann: I have it here, your Honor.

The Court: In what case was that?

Mr. Weymann: I will give you the citation. It is United States vs. 297 Acres of Land in Madera County.

The Court: That is right. So the Supreme Court has recognized the power of the legislature and the power of the Congress to say that upon doing certain things, the Government shall be entitled to take the property, and that the only thing that shall be left to the defendant is to prove in court the amount of money to which he is entitled. That is exactly what we instruct juries in these cases to do.

In the last case I tried the instructions I gave were so satisfactory, not only to the Government, but to Mr. Burrill, who represents probably the most famous firm in California in this type of litigation—it used to be Judge Bledsoe's firm and was called Bledsoe, Hill, Morgan & Farrer, although now I think it is Hill, Farrer and somebody else——

Mr. Weymann: Hill, Farrer and Burrill.

The Court: ——Hill, Farrer and Burrill—as I say, the instructions I gave were so satisfactory and the award involved on the property was nearly \$80,000, these men did not for one moment disagree with the instructions that I gave to the jury, and what I have just summarized is one of the instructions we [65] give in all these cases, to point out to the jury what rights they have.

As a matter of fact, in that case one of the owners, Dr. Tamplin, testified. She was a doctor of medicine and she said her family had paid taxes for 80 years on the property. I thought she was trying to get the sympathy of the jury, so I told the jury that, unfortunately, the law does not consider sentiment, and that the fact that she may not want to part with the property for sentimental reasons has nothing to do with the valuation, and that portion of the instructions was not objected to. I make this statement because we judges frequently are in a very embarrassing position when litigants who can employ attorneys do not employ attorneys. Of course, if people are indigent, then you are sorry for them. But when people who can employ

attorneys do not employ attorneys, we are in a very peculiar position, because we are dealing with people who have certain definite ideas, and you cannot treat them as you do lawyers, because you have to respect their lack of knowledge, as it were, and so we try to lean backwards in these cases, as I did in this case.

If I had known from the record that Mrs. Barnes and Mr. McKendry, and the other defendant, were represented by attorneys, I would have issued the temporary restraining order for a period of 10 days, and made this returnable later on, [66] because a lawyer would have understood. But I knew Mrs. Barnes would not understand, because she does not understand the law. She has already accused me of having made up my mind. Of course, I have a right to make up my mind after I have heard the evidence in the case. I do not have to take a matter like this under submission and think about it for a month before deciding it. We have to make up our minds when an injunction matter is presented to us very quickly from the facts.

So what we bear in mind is this, to get back to fundamentals: The Congress of the United States has said that whenever a complaint is filed, the property automatically passes into the hands of the Government. The Government does not even need a declaration of taking. But the Government to be safe, as I explained before, in order to fix a date for the transfer of title of the property asks for a decree, called a decree of declaration of taking, and in this particular case that decree was

entered on the same day on which the complaint was filed.

That was on the 27th of February, and later on, in March, a request reached me for withdrawal of the money deposited. On March 31st a petition reached me and the petition was presented by Mr. E. S. McKendry, William Emmert Barnes and Florence Lowe Barnes, also known as Pancho Barnes, which prayed the court for an order directing the clerk of the court to pay [67] out of the funds on deposit certain sums of money. There were several of them. A small one which called for \$7,560.95 to the Collector of Internal Revenue, and one to the State of California for \$1,841.78, and then another one, I think, for \$194,000.

Mr. Weymann: That is the aggregate of all of them, your Honor.

The Court: Wait a minute. Here it is,—\$172,753.76.

In the petition it was requested that this be credited against the account of any compensation to be received by judgment entered in this court determining the compensable injury.

Of course, every such order we make, and we make quite a number of them, is postulated upon the proposition that the title to the property is already in the hands of the Government, and that they are entitled at least to that amount. We keep some back, and, of course, it is without prejudice; that is, it means that the Government may have to pay more. But when the owners apply for it, ordinarily it is assumed that they do not expect the

proceedings to terminate. They expect the Government to go through. Otherwise the Government would not do that, because if it did, as is done sometimes in the State, you run into this situation: that is, we have a famous case in California where the Los Angeles Times owned property, the old Times Building, and it was [68] condemned by the State, and after an award was made, which the State said was too high, they went and dismissed the case, which under the law they could do. The Los Angeles Times went to the Supreme Court of California and convinced that court that that would be unfair to them. They showed, for instance, that they had acquired a new site, on which the new building now is, and on the basis of estoppel, as the court held, by instituting the proceedings and conducting them, as they did, the State had led the defendants to believe that they intended to go through with it, and that while technically that is a matter of law, that they had a right to abandon it, it would be inequitable to let them abandon it. The Supreme Court said that the Los Angeles Times was right, and the City of Los Angeles was forbidden to dismiss the suit and was compelled to pay the amount of money that had been found.

So a lot of thing come into these cases. Condemnation law is very intricate. I admire Mrs. Barnes' courage in thinking that she can properly present the intricate matters that the law of condemnation and the law of compensation presents. There are not one hundred lawyers in the State of California out of seven thousand who know a great deal about

condemnation law, and there aren't more than five or six firms out of four thousand lawyers in the County of Los Angeles who will even take such a case, because it is so [69] complicated in its ramifications.

I am making this statement to point to the fact that the Congress has made certain rules and regulations, and the Supreme Court has said the rules and regulations are the law.

This property is already the property of the Government of the United States, and the Government of the United States has a right to say that nobody is to change the contour of that property. The fact that the judge might set aside and make the defendant return the \$192,000 is a possibility that we need not concern ourselves with here. But for the present, so far as the law is concerned, the property is the property of the United States of America, subject to the right of the defendants to receive, in addition to the money they have already received, such additional sum as a judge or jury shall determine is the just compensation as of the day of taking, which is as of the 27th of February, 1953.

So it is an elementary proposition that the man who owns property has a right to have an injunction against anyone, whether he occupies it by consent or otherwise, from putting any structure on it without the consent of the Government.

If I lease property to you, unless the right is reserved, I have a right to stop you from building

any structure on it, no matter how much value that might add to the property.

There is one other matter. It is already admitted that [70] what was done here was to take the frame of a structure and enclose it and make it a livable structure, or make the terrain usable, by protecting it against the wind. Now, whether that involved the expenditure of \$100 or \$1,000 is not material. The Government of the United States is the only one who has the right to say what changes should occur in that property from the moment of its taking.

In this particular case the Government was not put in immediate possession. They did not ask for the right of immediate possession. I do not know why they did not do it. Often they do not do it, and when they don't, they get into trouble, because the people assume that they have a right to remain. But when they do that, it is the function of the court to prevent them from changing the property.

Why, just the other day I issued a temporary injunction to prevent the people who are mining a part of Muroc Lake for that rotary mud, without a hearing, to stop them from removing more of the mud, because the removal of it would change the contour of the property which the Government had already acquired. So it is the most common thing for us to be asked to issue injunctive relief where the object is to maintain the property in status quo.

There is also this to consider. It becomes very important in fixing valuations to know that when an appraiser has gone out he sees the property as it

existed, and where there [71] has been a change the problem always arises as to what was there on the property at the time of taking. It is very easy to say, "Oh, well, these buildings here were not in any different form, except that I paved a little here, and I put a roof on it. I just spent a few dollars."

That reminds me of the old story of the man who said that he had a barrel, and he said it was an heirloom, it had been in the family for a hundred years. And a man said to him, "Look, do you mean to say there has never been any repair on this old barrel?" And the man said, "Oh, yes, my grandfather had some staves taken out and replaced, and my father had some new hoops put around it, and my great-grandmother before him did something else." So the fellow decided that the only heirloom that was left was the bung-hole.

That just shows the difficulty in trying to reconstruct a thing to the way it was, the moment you make changes in property as of a particular date.

Now, it is admitted by Mrs. Barnes and Mr. McKendry that they have made these changes, and they have no right to make them, and they intend to make additional changes. They may say they are only going to paint, but we don't know what may be done.

Of course, if the Government were willing to accept her stipulation, that would be up to the Government. I am not [72] concerned with that. But if the Government is not willing to accept a stipulation then an injunction is the only remedy. Furthermore, if, as Mrs. Barnes says, she does not intend

to do anything further, then she is not harmed, because the Government is not going to have her tear down the glass that she has put up now, and the Government is not asking her to demolish the property and to restore it to what it was. The Government merely seeks that there be no further attempts made to change the appearance, the contour of the structure, until the cause is determined.

She says she is very hopeful of winning a decision on the motions. If I had heard the other motion, I probably could express an opinion as to the chances, but as I didn't hear it, and I don't know what is in these affidavits which have not even been opened, I don't know what factual situation she has brought to the attention of the court, that might result in a court taking the radical measure of setting aside a declaration of taking and determining that the taking is not necessary, and restoring the property to the defendant and making her restore the money she has already received.

Frankly, I do not know of any case where it has gone as far as this one has, where any court has ever done that.

Mr. Weymann: I don't know of any either, your Honor.

The Court: I do not know of any, but this may be one of the new things that may be done. But, as I say, I am not [73] prejudging that because it is not before me. I could not handle it if I wanted to, because it has been partly heard by another judge. I acquainted myself with the record in that respect

while I was waiting this morning, because I felt that I ought to know what had gone on.

Now, in addition to the declaration of taking and the order on the declaration of taking there is that distribution, which I ordered under the petition and signature of Mrs. Barnes. It was not an ex parte order. The only so-called ex parte order was the decree on the declaration of taking, and there is no provision for a hearing, under the law, on that, and the court has never held that anybody is entitled to a hearing in those cases. The only cases in which we hold a hearing is on an order for immediate possession, and the only reason we hold a hearing is to avoid any injustice to occupants. I have heard several such cases.

For instance, when the Navy wanted that big piece of land at Pacific Beach in San Diego County, I held an open hearing and heard witnesses, because there were people who had their homes there, which had to be demolished, and this was in wartime. That was in 1943 and 1944, and they might probably have been left to sleep in the streets if their wishes were not consulted. So we held hearings and asked each person, "What do you intend to do, and how much time do you want to move your house, if you are going to move it?" And, "How much [74] time do you think you will need to relocate yourself?"

Then when an order for immediate possession was issued, the time was fixed for the various persons to vacate the property.

Now, if Judge Beaumont should decide that for some reason the entire proceeding is invalid, and set aside the order made by me and order the case dismissed, which, as I say, is a very remote possibility, because I know of no instance where a case strong enough has been made to warrant such a drastic action on the part of any court, but assuming that to be the case, it would merely mean that everybody would be restored to the condition in which he was. Mrs. Barnes would have to return the money that the Government had paid out on her own application, and the Government would have to give back full possession of the property to her.

In any event, maintaining the status quo cannot harm the defendants, and if the injunction is not issued, and they continue to make changes that to them may appear to be immaterial, may create a lot of confusion in the record. It is certainly the right of the Government of the United States to say what improvements shall be placed there, because it is already the owner of the property, and has already paid on account some \$200,000. The condemnation case is merely a forcible sale, and the Government has already made a down payment. I am putting it Mrs. Barnes' way. The Government [75] has made a down payment of \$200,000, and if the deal does not go through, somebody is going to have to return the \$200,000. At any rate, the Government has \$200,000 in the deal, and also the obligation to pay more if it goes on. So, in addition to that, assuming that the case is to go on, many difficulties would arise if the contour of the prop-

erty is changed in any manner from what it was on the day it was taken.

I find, therefore, that according to the admissions of the defendants themselves, they have added other structures there, that the additions are substantial, that they were made without the consent of the Government, that there is a likelihood unless restraint is made, others might be done, and that if this was not enjoined it would result not only in injuring the Government in its right of property, but it might create later difficulties when it came to valuation. So the only way of preventing further injury is to issue this injunction, which, of course, will fall by the wayside if Judge Beaumont shall decide that the action should be dismissed.

I notice also from the record that the motions are still subject to argument. The deposition has not been read yet. Mrs. Barnes was asked by Judge Beaumont if she wanted to submit the matter after the depositions were in, and after briefs, and she said no, she wanted to make a speech. Evidently, [76] she has in mind the speech she wants to make, and Judge Beaumont said it was all right with him, that after the depositions were in a time for argument would be fixed.

I find no entry in the record fixing the time for the argument. Am I correct?

Mr. Weymann: Judge Beaumont has set aside the 23rd and 24th of February for the determination not only of those two motions, but of the five other motions which have been made.

The Court: In this case?

Mr. Weymann: In this case.

The Court: Then it is for that reason that I am coming up at that time. He has asked me to take over his own calendar at that time, so that we will run two courts in that week. I will try two condemnation cases involving other matters while he completes this. I did not know what it was. I knew that it was something which required him to ask for assistance, so I have agreed to come back and try his regular calendar while he disposes of these matters.

At any rate, that will be the order of the court, and you will prepare the order.

Mr. Weymann: I will prepare and submit the order.

The Court: And make the findings, as required by the rule. Under the rule, you will be served with the proposed order, and then you will have five days in which to present [77] in writing any objections which you have, and you will file them with the clerk. The clerk will keep Mr. Weymann's proposed findings and order of injunction for five days, to allow you the time to file them, and they are to be filed up here. Then when they are both received, the clerk will present them to me, either here or in Los Angeles, to determine whether changes should be made.

Mr. Weymann: May we understand that the defendant from here on is restrained from making any further changes?

The Court: Oh, yes. The injunction is issued. The minute order will show the injunction, as

prayed for, is issued upon the basis of the findings which I have announced. What will follow will be merely the formal findings and formal injunction, which is required under the rules.

Mr. Weymann: Very well, your Honor.

Mrs. Barnes: I don't understand it, your Honor. I would like to have you make it very clear to me, because this whole thing has been stirred up over nothing.

The Court: The session is at end. It is not my function to give explanations. What I have said is plain enough to anyone who understands the English language, and for anything further you can get a lawyer to explain it to you. [78]

[Endorsed]: Filed May 19, 1954.

[Endorsed]: No. 14380. United States Court of Appeals for the Ninth Circuit. E. S. McKendry and Pancho Barnes, also known as Florence Lowe Barnes and as Florence Lowe Barnes McKendry, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Northern Division.

Filed: June 4, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14380

E. S. McKENDRY and PANCHO BARNES,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

To: The Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

1. The District Court erred in the preliminary statement in the temporary injunction, wherein the District Court stated that William Emmert Barnes was named in the order to show cause.

2. The District Court erred in the preliminary statement in the temporary injunction, wherein the District Court stated defendant William Emmert Barnes failed to appear.

3. The District Court erred in Finding No. I, wherein the District Court found that title to the land and premises became vested in the plaintiff United States of America on February 27, 1953.

4. The District Court erred in Finding No. II, wherein the District Court found that notwithstanding the ownership of said property by the United States of America as aforesaid, the above named defendants continue to occupy said premises to the exclusion of the United States of America.

5. The District Court erred in Finding No. III, wherein the District Court found that without the consent and against the will of the United States of America the said defendants have made changes in the physical characteristics of said property by constructing certain improvements thereon and they will continue with such construction unless enjoined by this court from proceeding with said construction.

6. The District Court erred in Finding No. IV, wherein the District Court found that plaintiff will suffer irreparable injury, loss, and damage by the continuance of the said acts of the defendants as aforesaid, in that plaintiff will be put to additional expense for the removal of said construction upon securing possession of said premises, and that the appraisal of the value of the structures and improvements for which the said defendants may be entitled to compensation in plaintiff's condemnation proceeding will be made more difficult and uncertain.

7. The District Court erred in Finding No. V, wherein the District Court found that by reason of the facts found as aforesaid the court is of the opinion and decides that plaintiff is entitled to a temporary injunction as prayed for.

8. The District Court erred in the final paragraph of the temporary injunction when the District Court issued the Temporary Injunction as follows: Wherefore, It Is Ordered and Adjudged that the defendants, Florence Lowe Barnes, also known as Florence Lowe Barnes McKendry, also known as

Pancho Barnes, E. S. McKendry, and William Emmert Barnes, and their respective attorneys, agents, servants, employees, and all persons acting by, through, or under them, or either of them, or by or through their order, be and they hereby are enjoined until further order of the court from erecting or causing to be erected or continuing to erect any buildings, structure, or improvement of any description upon any portion of the premises described in plaintiff's complaint and its declaration of taking on file herein. Said premises are known and described as all of Section 20, Township 9 North, Range 10 West, San Bernardino Meridian, in the County of Kern, State of California.

9. The District Court erred in accepting Plaintiff's unauthenticated Exhibit No. I into evidence.

10. The District Court erred in not taking cognizance of the discrepancies between the affidavits made by the Plaintiff's witnesses and their testimony in court.

11. The District Court erred in not finding that the issue as to the title of the premises is contested as between plaintiff and defendants and is still undecided by the court.

12. The District Court erred in not making a finding that the title to property was a defeasible title subject to being set aside by court decision.

13. The District Court erred in not finding that the defendants workmen were not about to construct nor were they engaged in construction work which was the only issue before the court at that time.

14. The District Court erred in making this statement in open Court: "I issued an order to show cause returnable this morning to be heard by Judge Beaumont or by me." However the order to show cause stated plainly that it was to be heard before Judge Yankwich.

15. The District Court erred in not taking into consideration that the following statements in the motion for the "temporary restraining order" were fallacious and untrue:

(a) Page 2 line 1 "of which the defendants and each of them had due notice". No notice ever was or has yet been officially given any of the defendants.

(b) Page 2 line 5 "and will, unless restrained by the Court, complete the erection of certain valuable buildings and improvements on said property".

(c) Page 2 line 7 "That the continuation of said acts by the said defendants will cause immediate and irreparable injury, loss, or damage to the United States of America in that it will be put to additional expense for the removal and demolition of said buildings and structures on said land, in order to construct the airplane runway for which said property was acquired; and the erection of additional buildings and structures on said property will subject the United States of America to additional claims for damages for the acquisition and removal of such additional structures and improvements now in the course of erection.

(d) Page 2 line "(a) each day of delay in restraining the continuance of the acts complained of

as hereinabove set forth will increase the cost to the United States of America in removing the obstructions to the construction of its aforesaid airplane runway; and (b) the said defendants have known for more than six months last past that plaintiff required the use of said property for the construction of its said airplane runway, and that such construction would necessitate the demolition and removal of existing structures.”

16. The District Court erred in placing himself on the bench of another District Judge to make a decision on this case that was already in the process of trial and being heard by another Judge. His decisions, comments and findings prove that he was not sufficiently familiar with this case to render a proper and qualified decision.

17. The District Court erred in concluding that the plaintiff United States of America, was entitled to a temporary injunction.

18. The District Court erred in issuing a temporary injunction for the plaintiff United States of America and against the defendants.

Signed and dated this 17th day of June, 1954.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 19, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

COUNTER-DESIGNATION OF RECORD FOR
PRINTING

The United States of America, appellee, designates the following for inclusion in the printed record:

1. Receipt and partial satisfaction executed by E. S. McKendry, as trustee, filed March 13, 1953.
2. Receipt and partial satisfaction executed by the Farmers and Merchants Bank of Long Beach, filed March 21, 1953.
3. Petition for partial distribution of compensation, filed March 31, 1953.
4. Order on petition for partial distribution, filed March 31, 1953.
5. Receipt executed by Bureau of Internal Revenue, filed April 17, 1953.
6. Receipt executed by State of California, filed April 17, 1953.
7. Those portions of the reporter's transcript of the proceedings on February 5, 1954, not designated by appellants.

THE UNITED STATES OF AMERICA,

/s/ By PERRY W. MORTON,

Assistant Attorney General

/s/ ROGER P. MARQUIS,

/s/ JOHN C. HARRINGTON,

Attorneys, Department of Justice,
Washington, D. C.

Certificate of Service attached.

[Endorsed]: Filed June 30, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

AMENDED DESIGNATION OF RECORD

Appellants, E. S. McKendry and Pancho Barnes, designates the following documents and excerpts from the Reporter's Transcript, to be printed as part of the record:

This Amended Designation of Record supercedes the original Designation of Record.

Eliminate any affidavits of service and insert the words "affidavit of service by mail."

Eliminate title of District Court and cause on each document except on Complaint and Temporary Injunction.

1. Complaint in Condemnation. Pages 2, 3, 4, 5.
2. Declaration of Taking.
3. Judgment on Declaration of Taking.
4. Petition for Partial Distribution.
5. Order on Petition for Partial Distribution.
6. Motion for Order of Immediate Possession.
7. Notice of Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment.

8. Motion for Temporary Restraining Order.
9. Order to Show Cause why Temporary Restraining Order Should not Issue.
10. Notice of Motion to Dismiss.
11. Order Denying Temporary Injunction.
12. Affidavit of Mailing.
13. Temporary Injunction.
- Opinion.

14. Supplemental Amendment to Motion to Set Aside Declaration and to Vacate and Set Aside Ex Parte Judgment.

15. Supplemental Amendment to Motion to Dismiss.

16. Notice of Appeal.

17. Undertaking for Costs on Appeal.

17. Designation of Record.

19. Motion for extension of time to file record and docket appeal.

20. The following portions of the Reporter's Transcript of Proceedings in the District Court, February 5, 1954:

* * * * *

21. Statement of Points.

22. Amended Designation of Record.

Dated this 18th day of July, 1954.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 20, 1954. Paul P. O'Brien, Clerk.



No. 14380

United States
Court of Appeals
for the Ninth Circuit

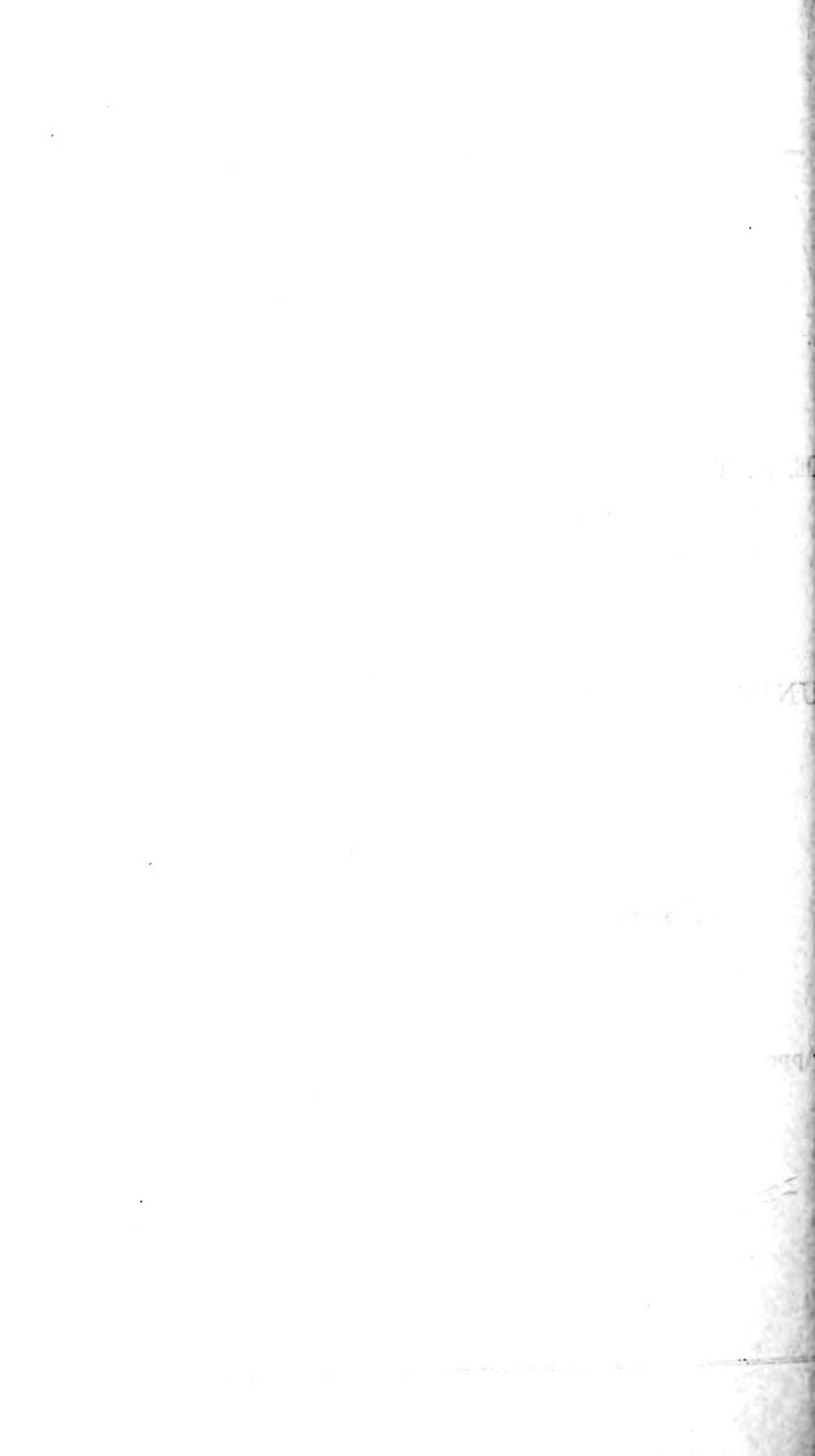
E. S. McKENDRY and PANCHO BARNES, also
known as Florence Lowe Barnes and as Florence
Lowe Barnes McKendry,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Supplemental
Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Central Division



In the United States District Court, Southern District of California, Northern Division

No. 1253-ND—Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

360 ACRES OF LAND IN THE COUNTY OF KERN, State of California; FLORENCE LOWE BARNES, et al., Defendants.

NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that E. S. McKendry, Pancho Barnes (also known as Florence Lowe Barnes), William Emmert Barnes, defendants above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order dated March 19, 1954 in which the Honorable Court's decision and ruling was that the defendants by the acceptance of monies as deposited by the government for their use without prejudice did constitute a "waiver of objections to the taking".

The Court having denied the defendants motion to dismiss the action and motion to set aside the declaration of taking predicated on the opinion that the defendants had waived their rights to contest the government action is directly opposed both to the law and to the representation and interpretations of the law as made by the government attorney and representatives to the defendants.

Furthermore notice is hereby given by the above

named defendants from the order dated March 19, 1954 granting plaintiffs motion for possession and from the order dated May 10, 1954 modifying the order dated March 19, 1954 with respect to the date of possession, made and entered in this cause by the Honorable Campbell E. Beaumont, Judge of the above entitled Court.

/s/ PANCHO BARNES,
/s/ E. S. McKENDRY,
/s/ WILLIAM EMMERT BARNES,
Appellants in Propria Persona

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, E. S. McKendry, Pancho Barnes and William Emmert Barnes, Defendants in the above entitled action are about to appeal to the Circuit Court of Appeals for the Ninth Circuit from judgment dated March 19, 1954, denying defendants motion to dismiss the action and denying defendants' motion to set aside the declaration of taking and granting plaintiff's motion for possession, in the District Court of the United States, for the Southern District of California, Northern Division

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Company, a cor

poration organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellants that said Appellants will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be hereto affixed, this 14th day of May, 1954.

[Seal] National Automobile and Casualty
 Insurance Company,
/s/ By William E. Fortney, Attorney-in-Fact

Examined and recommended for approval as provided in Rule 8.

I hereby approve the foregoing bond. Dated the 17th day of May, 1954. Edmund L. Smith, Clerk, U. S. District Court, Southern District of California; signed by Charles E. Jones, Deputy.

Affidavit of Verification attached.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Come now the appellants and pursuant to Rule 75 (a) R. C. P., designate the following as the contents of the record on appeal.

1. Complaint in Condemnation.
2. Declaration of Taking.
3. Decree on Declaration of Taking.
4. Motion to Dismiss.
5. Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment entered thereon.
6. Supplemental Amendment to Motion to Dismiss.
7. Supplemental Amendment to Motion to Set Aside Declaration of Taking and to Vacate and Set Aside Ex Parte Judgment.
8. Notice of Motion for an Order of Immediate Possession.
9. Defendant's Memorandum in Opposition to Plaintiff's Application for Order of Immediate Possession.
10. Petition for Partial Distribution of Compensation Pursuant to Section 258a, Title 40, USC, filed March 11, 1953.
11. Petition for Partial Distribution of Compensation, dated March 26, 1953.
12. Memorandum of Opinion and Orders.
13. Order Modifying Order for Immediate Possession.

14. Notice of Appeal to Court of Appeals for the Ninth Circuit under Rule 73(b) and Title 28 U.S.C.A. (Revised) Section 1292.

15. Undertaking for Costs on Appeal.

16. This Designation.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona

Acknowledgment of Service attached.

[Endorsed]: Filed July 9, 1954.

[Title of District Court and Cause.]

COUNTER-DESIGNATION OF THE RECORD ON APPEAL

Comes Now plaintiff and appellee, United States of America, and pursuant to the provisions of Rule 75(a) designates the following additional portions of the record and proceedings for inclusion in the record on appeal in the above entitled action.

This counter-designation is in response to the designation of the record on appeal filed by appellants July 9, 1954.

1. Order on petition for partial distribution of compensation pursuant to Section 258a, Title 40, USCA, filed March 11, 1953;

2. Order on petition for partial distribution of compensation pursuant to Section 258a, Title 40, USCA, filed March 31, 1953;

3. Receipt and partial satisfaction executed by E. S. McKendry, as Trustee, for \$172,753.76, filed March 13, 1953;

4. Receipt and full satisfaction of judgment executed by the Farmers and Merchants Bank of Long Beach for \$12,246.24, filed March 21, 1953;

5. Receipt executed by Bureau of Internal Revenue for \$7,560.95, filed April 17, 1953;

6. Receipt executed by State of California, Department of Employment, for \$1,841.78, filed April 17, 1953;

7. This counter-designation.

Dated: July 19, 1954.

LAUGHLIN E. WATERS,

United States Attorney

A. WEYMANN,

Assistant U. S. Attorney,

/s/ By A. WEYMANN,

Attorneys for Plaintiff-Appellee

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 19, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 9, inclusive, contain the original Notice of Appeal; Designation and Counter-

Designation of Record on Appeal and Motion and Order Extending Time to Docket Appeal which, together with the Transcript of Record on Appeal in Cause No. 14380 in the United States Court of Appeals for the Ninth Circuit constitute the transcript of record on this appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 13th day of August, 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

[Endorsed]: No. 14380. United States Court of Appeals for the Ninth Circuit. E. S. McKendry and Pancho Barnes, also known as Florence Lowe Barnes and as Florence Lowe Barnes McKendry, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: August 16, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14380

E. S. McKENDRY and PANCHO BARNES,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

To: The Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

1. The District Court erred in his preliminary statement in the Memorandum of Opinion and Orders dated March 19th, 1954, wherein the District Court stated "it is clear that the acceptance of such amount constitutes a waiver of objections to the taking".

2. The District Court erred in denying the defendant's "Motion to Dismiss" the condemnation suit as predicated on his decision that the defendants had made a "waiver of objections to the taking".

3. The District Court erred in denying the defendant's "Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment" as predicated on his decision that the defendants had made a "waiver of objections to the taking".

4. The District Court erred in his denial of the

defendant's Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment despite overwhelming evidence that the estimate of "just compensation" was obviously far below any possibility of replacing the installation, let alone "just compensation" for the property. The property was taken without just compensation. Had the "estimate" been sufficient to replace said property then it might be assumed that the plaintiff's credit would be good for any balance as decided by a condemnation suit. But the 5th Amendment of the Constitution says "nor shall private property be taken for public use without just compensation". The Constitution has been violated in this case to such a degree that the "estimate" was so low as to constitute an estimate made in bad faith and a hardship on the defendants wherein they did not receive the protection of the Constitution of the United States which is their acknowledged birthright as citizens of the United States of America. (Emphasis added.)

5. The District Court erred in granting the plaintiff possession of the property as by his own finding and opinion it clearly shows that the plaintiff had no immediate or in fact any necessity for the property. Therefore possession of the property should not have been granted unless a necessity should be shown and or a condemnation suit be entirely disposed of.

6. The District Court erred in denying the defendant's Motion to Dismiss the condemnation suit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14380

E. S. McKENDRY and PANCHO BARNES,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

To: The Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

1. The District Court erred in his preliminary statement in the Memorandum of Opinion and Orders dated March 19th, 1954, wherein the District Court stated "it is clear that the acceptance of such amount constitutes a waiver of objections to the taking".

2. The District Court erred in denying the defendant's "Motion to Dismiss" the condemnation suit as predicated on his decision that the defendants had made a "waiver of objections to the taking".

3. The District Court erred in denying the defendant's "Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment" as predicated on his decision that the defendants had made a "waiver of objections to the taking".

4. The District Court erred in his denial of the

defendant's Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment despite overwhelming evidence that the estimate of "just compensation" was obviously far below any possibility of replacing the installation, let alone "just compensation" for the property. The property was taken without just compensation. Had the "estimate" been sufficient to replace said property then it might be assumed that the plaintiff's credit would be good for any balance as decided by a condemnation suit. But the 5th Amendment of the Constitution says "nor shall private property be taken for public use without just compensation". The Constitution has been violated in this case to such a degree that the "estimate" was so low as to constitute an estimate made in bad faith and a hardship on the defendants wherein they did not receive the protection of the Constitution of the United States which is their acknowledged birthright as citizens of the United States of America. (Emphasis added.)

5. The District Court erred in granting the plaintiff possession of the property as by his own finding and opinion it clearly shows that the plaintiff had no immediate or in fact any necessity for the property. Therefore possession of the property should not have been granted unless a necessity should be shown and or a condemnation suit be entirely disposed of.

6. The District Court erred in denying the defendant's Motion to Dismiss the condemnation suit.

7. The District Court erred in denying the defendant's Motion to Set Aside the Declaration of Taking and Vacate the Ex Parte Judgment.

8. The District Court erred in granting the plaintiff's Motion for possession of the property.

Signed and dated this 11th day of September, 1954.

/s/ PANCHO BARNES,

/s/ E. S. McKENDRY,

Appellants in Propria Persona

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 13, 1954. Paul P. O'Brien, Clerk.

No. 14390

United States
Court of Appeals
for the Ninth Circuit

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UNITED STATES OF AMERICA; and CAR-
ROLL, HEDLUND & ASSOCIATES, INC.,
a Washington Corporation, Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY,
his wife, Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

JUL 26 1954

PAUL P. O'BRIEN
CLERK

No. 14390

United States
Court of Appeals
for the Ninth Circuit

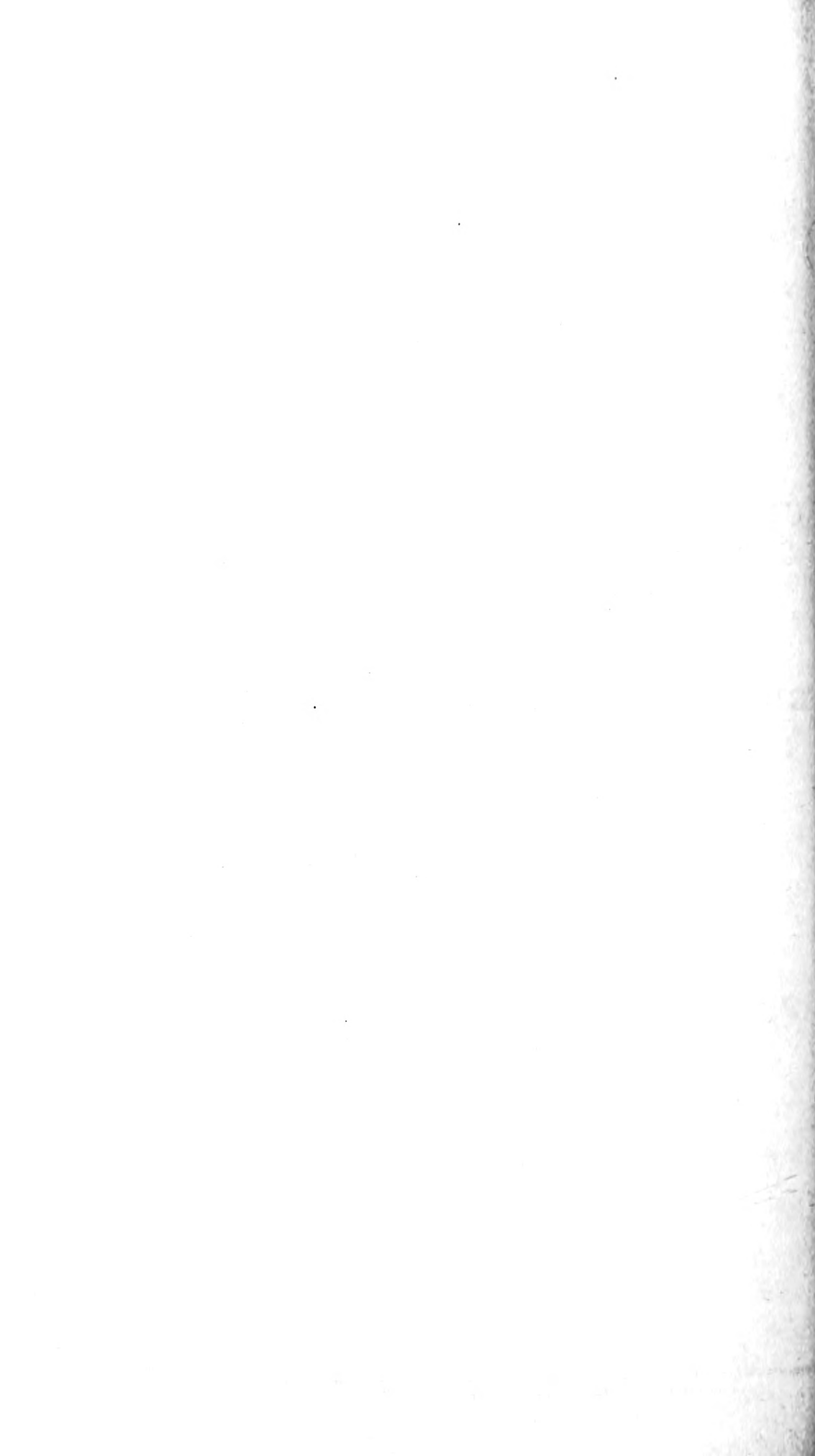
UNITED STATES OF AMERICA; and CAR-
ROLL, HEDLUND & ASSOCIATES, INC.,
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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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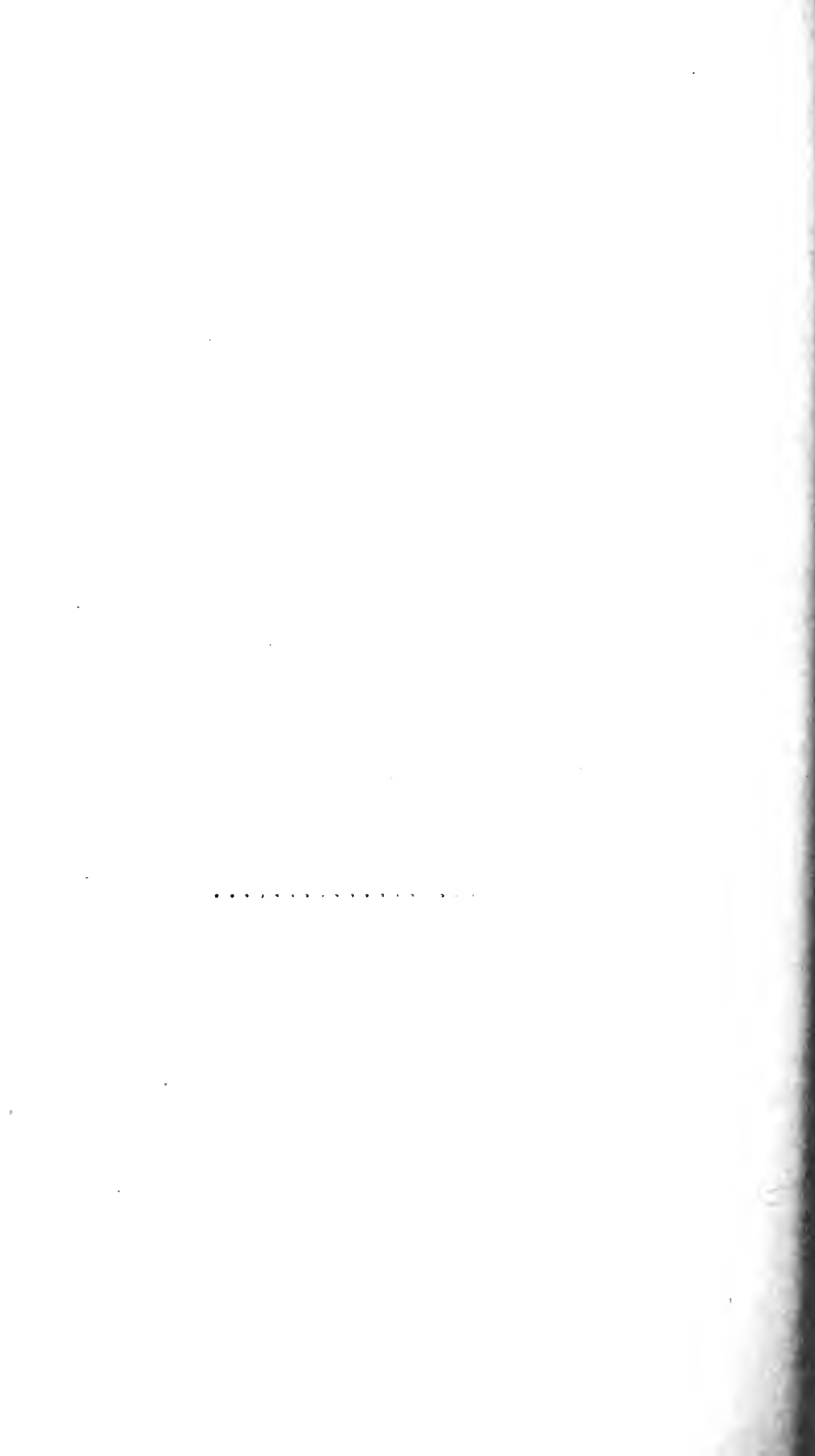
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Seattle 4, Washington,

Attorneys for Appellants.

R. P. GUIMONT,
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Seattle 4, Washington,
Attorney for Appellees.

In the District Court of the United States for
Western Washington, Northern Division

No. 3386

RICHARD E. DOOLEY and JEAN DOOLEY,
his wife, Plaintiffs,

vs.

UNITED STATES OF AMERICA and CAR-
ROLL HEDLUND & ASSOCIATES, INC.,
a Washington corporation,
Defendants.

COMPLAINT

Plaintiffs, complaining of defendants, alleges:

I.

That jurisdiction herein is founded on a claim against the United States of America for money only on account of damage and personal injuries sustained by plaintiffs, caused by the negligence of an agency of the Government, to-wit: Federal Housing Administration, and its agent, Carroll Hedlund & Associates, Inc., a Washington corporation organized and authorized to do business under the laws of the State of Washington. This action arises under the Federal Tort Claims Act of August 2, 1946, Chapter 753, Title 4, Part 3, Section 410, 28 U.S.C., Section 931.

II.

That at all times herein mentioned Richard E.

Dooley and Jean Dooley have been and now are husband and wife, citizens of the United States and residents of King County, Washington.

III.

That at all times herein mentioned the Federal Housing Administration of the United States of America was and now is the owner and operator of Lake Burien Heights Apartments located at 1101 S. W. 139th, King County, Washington. That at all times herein mentioned the defendant, Carroll Hedlund & Associates, Inc., a Washington corporation, was and now is the managing agent of said Lake Burien Heights Apartments for and on behalf of the Federal Housing Administration of the United States of America.

IV.

That at all times herein mentioned the walks and driveways of the premises known as Lake Burien Heights Apartments, owned and operated by defendant, United States of America, were under the exclusive jurisdiction, control and supervision of the said defendant and its agent, Carroll Hedlund & Associates, Inc., a Washington corporation.

V.

That on June 1, 1952 the plaintiffs herein rented from the defendant United States of America and its agents aforementioned, an apartment in said Lake Burien Heights Apartments at a monthly rental of \$69.50 per month, being Apartment No.

101 located at 13710 - 12th S. W., King County, Washington.

VI.

That on or about the 5th day of November, 1952 at approximately 5:40 p.m., the plaintiff, Jean Dooley, left the apartment of the plaintiffs and walked on the walk provided for the tenants of said apartments toward a grocery store. That while proceeding on the said walk, which was under the jurisdiction, control and supervision of defendants, the plaintiff tripped over a wire approximately 12 inches high which had been erected by defendants to keep pedestrians from walking on the newly planted lawns along the edge of the sidewalk and which wire had become broken in places and had then curled up and was permitted by defendants to obstruct the sidewalk in a place in which defendants knew that plaintiff or the public would customarily and necessarily walk. That as a result of defendants' negligence, plaintiff Jean Dooley tripped over said wire and fell violently to the ground, severely injuring and damaging plaintiffs as hereinafter set forth. That at said time and place it was dark and there was no light on said sidewalk and the wire was invisible to the plaintiff. That prior to said time defendants had been notified of the defective condition of the wire, and said wire had been permitted to remain broken and to lie curled upon the sidewalk by the defendants.

VII.

That the defendants were negligent in permitting

said wire to remain on the sidewalk where defendants knew or in the exercise of reasonable care should have known that the tenants of said apartments walked and in the darkness would be subject to danger; and in failing to remove the hidden danger caused by the wire being permitted to remain on the sidewalk in a place where tenants of said apartments would be in the habit of walking, after having been notified that said dangerous obstruction existed upon said sidewalk; and in failing to furnish proper lighting to light the sidewalk leading into and out of the apartments operated and controlled by the defendants. That said negligence of the defendants was a direct and proximate concurring cause of all of plaintiff's injury and damage as hereinafter alleged.

VIII.

That as a direct and proximate result of the aforesaid negligence of the defendants, plaintiff, Jean Dooley, sustained fracture of the patella bone of her left leg, severe shock, and damage to her nervous system. That at the time of plaintiff's injuries plaintiff was then five weeks pregnant and since said injuries plaintiff has experienced continual symptoms of miscarriage. That as a result of said injuries plaintiff was hospitalized in the Maynard Hospital in the City of Seattle and her left limb was in a cast for four weeks. That plaintiff has been informed and therefore alleges that said injuries may cause an arthritis to develop in the knee joint of her left limb. That at the present

time .plaintiff has a scar extending five inches across her knee. That the pain, discomfort and stiffness in plaintiff's left limb was and now is disabling and on information and belief plaintiff alleges the pain, discomfort and stiffness in said left limb will continue for an indefinite period in the future. That all of said injuries and damages sustained by plaintiffs were suffered as a direct and proximate result of the negligence of the defendants and by reason thereof plaintiffs have been damaged in the sum of \$7,500.00.

IX.

That in addition to the foregoing damages, the following special damages were sustained by plaintiffs as a direct and proximate result of the negligence of the said defendants, to-wit: that plaintiff has become reasonably obligated for hospital and medical expenses in the sum of \$474.00. That plaintiff has been advised that she needs two therapy treatments per week for the next year. That said treatments would be at an expense of \$4.00 per treatment, or a total of \$416.00.

X.

That as a direct and proximate result of the negligence of the said defendants, plaintiff has been disabled and required services of a housekeeper to manage her home and her children during said disability at an expense of \$200.00.

XI.

That as a direct and proximate result of the aforesaid negligence of the defendants, and by

reason of the matters and things hereinbefore alleged, plaintiffs have been damaged in the total sum of \$8,590.00.

Wherefore, plaintiffs pray for judgment against the defendants, United States of America and Carroll Hedlund & Associates, Inc., a Washington corporation, and each of them, in the total sum of \$8,590.00, and for their costs and disbursements herein to be taxed.

DURHAM & GUIMONT,
/s/ By R. P. GUIMONT,
Attorneys for Plaintiffs.

Duly Verified.

[Endorsed]: Filed March 4, 1953.

[Title of District Court and Cause.]

ANSWER

Come now the defendants and answering the plaintiffs complaint herein, admit, deny and allege as follows:

I.

Answering paragraph II thereof, deny the same for lack of information sufficient to form a belief as to the truth or falsity of the allegations therein contained.

II.

Answering paragraphs VI, VII, VIII, IX, X and XI, deny the same and each and every allegation therein contained.

Further Answering the plaintiffs' complaint herein and by way of Affirmative Defense, defendants allege that if the plaintiffs were injured or damaged as alleged in the complaint herein, or at all, such injuries or damages were solely and proximately caused by the negligence of the plaintiffs, and in particular the defendants allege that the plaintiff was guilty of contributory negligence.

/s/ S. W. BRETHORST,

/s/ A. T. BATEMAN,

/s/ RICHARD C. REED,

Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed May 25, 1953.

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs and for reply to the answer of the defendants herein, admit, deny and allege as follows:

I.

Replying to defendants' affirmative defense, plaintiffs deny each and every allegation therein contained.

Wherefore, having fully replied to the defendants' Answer and Affirmative Defense, plaintiffs

pray for judgment as set forth in their complaint on file herein.

DURHAM & GUIMONT,
/s/ By R. P. GUIMONT,
Attorneys for Plaintiffs.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed July 1, 1953.

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the defendants, United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, in aid of the Court and without waiving Rules 52 and 59, or any other, of the Federal Rules of Civil Procedure, and state defendants' disapproval and objection to the plaintiffs' proposed findings of fact and conclusions of law heretofore served herein, for and upon the following reasons:

(1) That plaintiffs' proposed findings of fact are incomplete;

(2) That plaintiffs' proposed findings of fact are not in accord with the findings orally announced by the Court in its oral decision;

(3) That plaintiffs' proposed findings of fact are not supported by the evidence adduced at the trial.

/s/ CHARLES P. MORIARTY,

/s/ By FRANCIS N. CUSHMAN,

Asst. U. S. Attorney,

Attorneys for defendant United

States of America,

/s/ A. T. BATEMAN,

Attorneys for defendant Carroll, Hedlund &

Associates, Inc., a Washington corporation.

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on duly and regularly for trial, and it appearing to the Court that a trial was had on March 10, 11, and 12, 1954, at which time the plaintiffs were present and represented by their counsel, R. P. Guimont, and the defendant, United States of America, represented by Francis N. Cushman, Assistant U. S. Attorney, and the defendant, Carroll, Hedlund & Associates, Inc., a Washington corporation, represented by Arthur T. Bateman of Brethorst, Fowler, Dewar, Bateman & Reed; and the Court having heard the testimony of witnesses on both sides and having

duly considered the same and the arguments of counsel, and being fully advised in the premises, makes the following:

Findings of Fact

I.

That this action was instituted by the plaintiffs against the United States of America pursuant to the provisions of Section 1346 (b), Title 28, U.S.C.A., and against Carroll, Hedlund & Associates, Inc., a Washington Corporation, its agent.

II.

That at all times herein mentioned Richard E. Dooley and Jean Dooley have been and now are husband and wife, citizens of the United States and residents of King County, Washington.

III.

That at all times mentioned herein, the Federal Housing Administration of the United States of America was and now is the owner and operator of Lake Burien Heights Apartments located at 1101 S. W. 139th, King County, Washington. That at all times herein mentioned the defendant, Carroll, Hedlund & Associates, Inc., a Washington corporation, was and now is the managing agent of said Lake Burien Heights Apartments for and on behalf of the Federal Housing Administration of the United States of America.

IV.

That at all times herein mentioned the walks and driveways of the premises known as Lake Burien Heights Apartments, owned and operated by defendant, United States of America, were under the exclusive jurisdiction, control and supervision of the said defendant and its agent, Carroll, Hedlund & Associates, Inc., a Washington corporation.

V.

That on June 1, 1952 the plaintiffs herein rented from the defendant United States of America and its agents aforementioned, an apartment in said Lake Burien Heights Apartments at a monthly rental of \$69.50 per month, being Apartment No. 101 located at 13710 - 12th S. W., King County, Washington.

VI.

That on or about the 5th day of November, 1952 at approximately 5:40 p.m. in the night time while proceeding on the sidewalk which was under the jurisdiction, control and supervision of defendants, the plaintiff, Jean Dooley, tripped over a wire which was disarranged from a wire barricade which had been erected by defendants to keep pedestrians from walking on the newly planted lawns and which wire had become broken down in places and had curled up and was permitted by defendants to obstruct the sidewalk in a place in which defendants knew that plaintiff would customarily and necessarily walk. That as a result of defendants' negligence in maintaining the wire barricade, plain-

tiff tripped over said wire and fell violently to the ground, severely injuring and damaging plaintiff, Jean Dooley.

VII.

That plaintiff, Jean Dooley, at all times mentioned herein exercised due and ordinary care for her own safety.

VIII.

That defendants were negligent in their failure to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk where defendants knew or in the exercise of reasonable care should have known that the tenants of said apartments walked and in the darkness would be subject to danger; and in failing to remove the hidden danger caused by the wire being permitted to remain on the sidewalk in a place where tenants of said apartments would be in the habit of walking, after having knowledge or in the exercise of reasonable care should have had knowledge that said dangerous obstruction existed upon said sidewalk. That said negligence of the defendants was a direct and proximate concurring cause of all of plaintiff's injury and damage.

IX.

That all of plaintiff's injuries and damages were the direct and proximate result of the negligence of the defendants and by reason thereof plaintiffs have been damaged, in respect to all their general and special damages herein, in the sum of \$5,000.00.

X.

That 20% of the amount of Judgment herein allowed is a reasonable attorney fee to be allowed plaintiffs' attorneys herein, and plaintiffs have agreed to said allowance; said allowance to be payable out of said sum of \$5,000.00.

Done in Open Court this 26th day of March, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That plaintiffs, Richard E. Dooley and Jean Dooley, his wife, should be granted judgment against defendants, United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, and each and all of them, for the sum of \$5,000.00, together with their costs and disbursements herein incurred.

Done in Open Court this 26th day of March, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ R. P. GUIMONT,
Attorney for Plaintiffs.

gether with their costs and disbursements herein incurred, hereby taxed in the sum of \$39.04.

Done in Open Court this 26th day of March, 1954.

/s/ JOHN C. BOWEN,

United States District Judge

Presented and approved by:

/s/ R. P. GUIMONT,

Attorney for Plaintiffs.

Approved as to form by, exceptions reserved:

/s/ F. N. CUSHMAN,

Assistant U. S. Attorney.

BRETHORST, FOWLER, DEWAR,

BATEMAN & REED,

/s/ A. L. BATEMAN,

Attorneys for Defendants.

[Endorsed]: Filed and entered March 26, 1954.

[Title of District Court and Cause.]

MOTION FOR AMENDMENT OF FINDINGS

The defendants, United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, move the Court that the Findings of Fact heretofore entered herein be amended as follows:

Proposed Amendments to Findings

Finding paragraph VI: Cancel Finding Paragraph VI and substitute therefor the following:

“That on the 5th day of November, 1952, at

shortly after 5:50 p.m., which was during the hours of darkness, the plaintiff Jean Dooley, while walking hurriedly along one of the sidewalks in the area of the Lake Burien Heights Apartment project site, which sidewalk was one of those maintained by the defendants for the common use of tenants, and which sidewalk is more particularly shown and indicated in the various and several exhibits on file herein, the said plaintiff tripped and fell as the result of coming in contact with a strand of wire which was lying curled and loose on or over the surface of said sidewalk. That said wire was in such a position and condition as the result of having been loosened, cut or broken from a wire barricade which had been erected by the defendants along the north side of said walk for the purpose of keeping pedestrians, including tenants of the apartment project, from walking on the newly planted lawn area adjacent to the walk."

Finding paragraph VII: Cancel Finding Paragraph VII and substitute therefor the following:

"That at said time and place the plaintiff Jean Dooley failed to exercise due or ordinary care for her own safety."

Finding paragraph VIII: Cancel Finding paragraph VIII and substitute therefor the following:

"That the presence or condition of said wire on said sidewalk was not shown to have been brought to the attention of the defendants, or either of them, nor was it shown how long said wire was there."

Finding paragraph IX: Cancel Finding paragraph IX and substitute therefor the following:

“That the injuries sustained by the plaintiff Jean Dooley and the damages sustained by the plaintiffs were not the result of nor proximately caused by any negligence of the defendants, or either of them, but were proximately caused by the failure of the plaintiff Jean Dooley to use ordinary care for her own safety.”

The defendants further move the Court that the Conclusions of Law and the Judgment heretofore entered herein be amended accordingly.

This motion is based upon Rule 52 (b) of the Rules of Civil Procedure.

/s/ F. N. CUSHMAN,

Assistant U.S. Attorney

/s/ A. T. BATEMAN,

Of Brethorst, Fowler, Dewar, Bateman & Reed,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed April 2, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendants, United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, move the Court that the judgment entered herein be vacated and set aside and that a new trial be granted on the following grounds and causes

materially affecting the substantial rights of the defendants:

(a) Insufficiency of the evidence, as follows:

(1) The evidence is insufficient to show that the defendants, or either of them, were negligent in maintaining the wire barricade.

(2) The evidence is insufficient to show that the plaintiff Jean Dooley tripped as the result of any negligence on the part of the defendants, or either of them.

(3) The evidence is insufficient to show that the defendants failed to maintain said barricade in a reasonably safe condition.

(4) The evidence is insufficient to show that the defendants, or either of them, permitted the said wire to remain on the sidewalk.

(5) The evidence is insufficient to show that the defendants, or either of them, permitted said wire to remain on the said sidewalk or failed to remove the same after defendants, or either of them, knew, or after the defendants, or either of them, should have known of the presence or existence of said wire on said sidewalk.

(6) That the evidence is insufficient to show that any negligence on the part of the defendants, or either of them, was a direct, proximate or concurring cause of all or any of the plaintiffs' injury or damage.

(b) Error in law occurring at the trial, as follows:

(1) The Court erred in finding that the defendants, or either of them, were negligent in maintaining the said barricade and that the negligence of

the defendants was a proximate or concurring cause of the plaintiffs' injury.

(2) The Court erred in concluding that the plaintiffs were entitled to judgment against the defendants, or either of them.

(c) The Court erred in entering judgment for the plaintiffs.

/s/ F. N. CUSHMAN,

Assistant U.S. Attorney

/s/ A. T. BATEMAN,

Of Brethorst, Fowler, Dewar, Bateman & Reed,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed April 2, 1954.

[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR NEW TRIAL
AND ORDER DENYING MOTION FOR
AMENDMENT OF FINDINGS**

This matter came regularly on for hearing in open Court on April 12, 1954, on the defendants' motion for a new trial and defendants' motion for amendment of findings, the plaintiffs being present in Court by their attorney, R. P. Guimont, and the defendants, United States of America and Carroll, Hedlund & Associates, being present in court by their attorneys, Leonard Ware, Assistant United States Attorney, and A. T. Bateman of Brethorst,

Fowler, Dewar, Bateman & Reed, and the Court having heard argument of counsel and being fully advised in the premises, it is here and now ordered:

(1) That the defendants' motion for a new trial be and the same is hereby denied;

(2) That the defendants' motion for amendment of findings be and the same is hereby denied, to all of which defendants except and their exceptions are allowed.

Done in open Court this 13th day of April, 1954.

/s/ JOHN C. BOWEN,
U.S. District Judge

Approved as to form:

/s/ R. P. GUIMONT,
Attorney for Plaintiffs.

Presented by with exceptions reserved:

/s/ F. N. CUSHMAN,
Assistant U.S. Attorney
/s/ A. T. BATEMAN,
Attorneys for Defendants.

[Endorsed]: Filed April 13, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, defendants above named,

hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 26th day of March, 1954.

/s/ A. T. BATEMAN,
Of Brethorst, Fowler, Dewar,
Bateman & Reed

/s/ F. N. CUSHMAN,
Assistant U.S. Attorney,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF CON- TENTS OF RECORD ON APPEAL

Come now the appellants, United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, defendants above named, and designate for inclusion in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit the complete record of proceedings and evidence in the above action, including:

(1) The following pleadings: Plaintiffs' Complaint, defendants' Answer, plaintiffs' Reply; and defendants' objections to plaintiffs' proposed findings;

(2) Findings of Fact and Conclusions of Law;

(3) The Judgment;

(4) Defendants' Motion for New Trial, defendants' Motion for Amendment of Findings of Fact;

(5) Order Denying Motion for New Trial and Order Denying Amendment of Findings;

(6) Defendants' Notice of Appeal;

(7) Appellants' Bond for Costs on Appeal;

(8) Appellants' Designation of Contents of Record on Appeal;

(9) Court Reporter's Transcript of the Evidence and Proceedings herein, two copies of which Transcript are filed herewith.

Respectfully submitted,

/s/ A. T. BATEMAN,

Of Brethorst, Fowler, Dewar,
Bateman & Reed

/s/ F. N. CUSHMAN,

Assistant U.S. Attorney,
Attorneys for Appellants,
Defendants above named.

Acknowledgment of Service attached.

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL OF APPELLANTS

On appeal herein to the United States Court of Appeals for the Ninth Circuit the appellants, United States of America and Carroll, Hedlund & Asso-

ciates, Inc., a Washington corporation, defendants above named, rely on the following points:

1. The United States District Court erred in denying the motion of said appellants to dismiss the plaintiffs' complaint for want of evidence sufficient to sustain a cause of action against the defendants, or either of them, made at the close of plaintiffs' case, and after plaintiffs had rested. (Transcript of Proceedings at Trial, page 161).

2. The United States District Court erred in making the following Findings of Fact:

“VI.

“That on or about the 5th day of November, 1952, at approximately 5:40 p.m. in the night time while proceeding on the sidewalk which was under the jurisdiction, control and supervision of defendants, the plaintiff, Jean Dooley, tripped over a wire which was disarranged from a wire barricade which had been erected by defendants to keep pedestrians from walking on the newly planted lawns and which wire had become broken down in places and had curled up and was permitted by defendants to obstruct the sidewalk in a place in which defendants knew that plaintiff would customarily and necessarily walk. That as a result of defendants' negligence in maintaining the wire barricade, plaintiff tripped over said wire and fell violently to the ground, severely injuring and damaging plaintiff, Jean Dooley.”

“VII.

“That plaintiff, Jean Dooley, at all times men-

tioned herein "exercised due and ordinary care for her own safety.

"VIII.

"That the defendants were negligent in their failure to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk where defendants knew or in the exercise of reasonable care should have known that the tenants of said apartments walked and in the darkness would be subject to danger; and in failing to remove the hidden danger caused by the wire being permitted to remain on the sidewalk in a place where tenants of said apartments would be in the habit of walking, after having knowledge or in the exercise of reasonable care should have had knowledge that said dangerous obstruction existed upon said sidewalk. That said negligence of the defendants was a direct and proximate concurring cause of all of plaintiff's injury and damage.

"IX.

"That all of plaintiff's injuries and damages were the direct and proximate result of the negligence of the defendants and by reason thereof plaintiffs have been damaged in the sum of \$5,000.00."

That said Findings are clearly erroneous and that said Findings are contrary to the evidence and the evidence was insufficient to show, and there was an entire absence of evidence to show:

- (a) That the defendants, or either of them, were negligent in maintaining the said wire barricade;
- (b) That the plaintiff, Jean Dooley, tripped over

said wire as the result of any negligence on the part of the defendants, or either of them;

(c) That the defendants, or either of them, failed to maintain said wire barricade in a reasonably safe condition, or that the defendants, or either of them, permitted said wire to remain on the sidewalk;

(d) That the defendants, or either of them, permitted said wire to remain on the said sidewalk or failed to remove the same after the defendants, or either of them, knew or after defendants, or either of them, should have known of the presence or existence of said wire on said sidewalk;

(e) That the defendants, or either of them, knew of the presence or existence of said wire on the sidewalk;

(f) That the defendants, or either of them, should have known of the existence of said wire upon the sidewalk;

(g) That the defendants, or either of them, were negligent or that any negligence of the defendants, or either of them, was a direct, proximate or concurring cause of plaintiffs' injury or damage;

(h) That the plaintiff Jean Dooley exercised reasonable care for her own safety.

3. That under the evidence the United States District Court erred in entering its Conclusions of Law that the plaintiffs were entitled to judgment against the defendants, or either of them.

4. That under the evidence the United States District Court erred in entering judgment for the plaintiffs and against the defendants, or either of them.

5. That the United States District Court erred in denying defendants' Motion for New Trial.

6. That the United States District Court erred in denying defendants' Motion for Amendment of Findings, Conclusions and Judgment.

/s/ A. T. BATEMAN,
Of Brethorst, Fowler, Dewar,
Bateman & Reed.

/s/ F. N. CUSHMAN,
Assistant U.S. Attorney
Attorneys for Appellants,
defendants above named.

[Endorsed]: Filed June 3, 1954.

[Title of District Court and Cause.]

APPELLANTS' SUPPLEMENTAL DESIGNA-
TION OF CONTENTS OF RECORD
ON APPEAL

Come now the appellants, United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, defendants above named, and designate for inclusion in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit, supplemental to appellants' designation of contents of record on appeal heretofore filed, the following:

1. All exhibits admitted in evidence at the trial herein;

2. Appellants' Supplemental Designation of Contents of Record on Appeal;

3. Order Directing Transmission of Original Exhibits.

Respectfully submitted,

/s/ A. T. BATEMAN,
Of Brethorst, Fowler, Dewar,
Bateman & Reed

/s/ F. N. CUSHMAN,
Assistant U.S. Attorney,
Attorneys for Appellants,
defendants above named.

Acknowledgment of Service attached.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMISSION OF ORIGINAL EXHIBITS

This matter coming on for hearing in open Court on the application of the above named defendants for an order directing transmission of original exhibits to the United States Court of Appeals for the Ninth Circuit on appeal herein, and it appearing to the Court that the defendants, appellants on appeal, have filed herewith Supplemental Designation of Contents of Record on Appeal designating for inclusion in the record on appeal herein all of the

exhibits admitted in evidence at the trial, and it appearing that certain thereof are not readily copiable into the record;

Now, therefore, the Clerk of the above-entitled Court be, and he is hereby, ordered to transmit to the United States Court of Appeals for the Ninth Circuit not less than ten (10) days prior to the hearing of the above cause on appeal all of the exhibits admitted in evidence herein at the trial not readily copiable into the record on appeal.

Done in open Court this 10th day of June, 1954.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ A. T. BATEMAN,
/s/ F. N. CUSHMAN

Acknowledgment of Service attached.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended of the United States Court of Appeals for the Ninth

Circuit, and Rule 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the following original documents, being all of the original documents and papers in the file dealing with the above cause, as the record on appeal from the judgment filed March 26, 1954 to the United States Court of Appeals for the Ninth Circuit, said papers being identified as follows:

1. Complaint, filed March 4, 1953.
2. Praecipe for Process, filed March 4, 1953.
3. Summons, with Marshal's Return thereon, filed May 6, 1953.
4. Appearance of United States Attorney, filed April 28, 1953.
5. Notice of Appearance of deft. Carroll, Hedlund & Associates, Inc., filed May 19, 1953.
6. Answer of defendants, filed May 25, 1953.
7. Reply, filed July 1, 1953.
8. Deposition of Jean Dooley, filed Feb. 26, 1954.
9. Praecipe for subpoena, Greenstreet, filed Mar. 2, 1954.
10. Marshal's Return on Subpoena, Greenstreet, filed March 3, 1954.
11. Excerpt from testimony of Dr. Paul E. Ruuska, filed March 10, 1954.
12. Trial Memorandum of defendants, filed Mar. 10, 1954.
13. Defendants' Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law, filed March 26, 1954.
14. Findings of Fact and Conclusions of Law, filed March 26, 1954.

15. Judgment for plaintiffs, filed March 26, 1954.

16. Cost Bill, filed March 26, 1954.

17. Motion for Amendment of Findings, filed April 2, 1954.

18. Motion for New Trial, filed April 2, 1954.

19. Order Denying Motion for New Trial and Amendment of Findings, filed April 13, 1954.

20. Notice of Appeal, filed May 10, 1954.

21. Bond for Costs on Appeal, filed May 10, 1954.

22. Bond for Costs on Appeal, filed May 19, 1954.

23. Court Reporter's Transcript of Proceedings at Trial, filed May 25, 1954.

24. Appellant's Designation of Contents of Record on Appeal, filed May 25, 1954.

25. Statement of Points on Appeal, filed June 3, 1954.

26. Appellants' Supplemental Designation, filed June 9, 1954.

27. Order Transmitting original admitted exhibits, filed June 10, 1954. Plaintiff's Exhibits 1, 2, 3, and 5 to 8 inclusive; and Defendants' Exhibits A-1 to A-16 inclusive.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for appellant.

Witness my hand and official seal this 10th day of June, 1954.

[Seal] MILLARD P. THOMAS,
 Clerk,
/s/ By TRUMAN EGGER,
 Chief Deputy. ,

In the District Court of the United States, Western District of Washington, Northern Division

No. 3386

RICHARD E. DOOLEY and JEAN DOOLEY,
his wife, Plaintiffs,
vs.

UNITED STATES OF AMERICA and CARROLL, HEDLUND & ASSOCIATES, INC.,
a Washington corporation,
Defendants.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Transcript of proceedings at trial had in the above-entitled and numbered cause commencing at 10:00 o'clock a.m., on Wednesday, March 10, 1954, at Seattle, Washington, before The Honorable John C. Bowen, United States District Judge.

Appearances: R. Pat Guimont, Esq., of Durham & Guimont, 1702 Smith Tower, Seattle, Washington, appeared for Plaintiffs. Arthur T. Bateman, Esq., of Brethorst, Fowler, Dewar, Bateman &

Reed, 1710 Hoge Building, Seattle, Washington, appeared for Defendant Carroll, Hedlund & Associates, Inc., a Washington corporation; and Francis N. Cushman, Esq., Assistant United States Attorney, United States Court House, Seattle, Washington, appeared for Defendant United States of America. [1*]

The Court: I ask, are parties and counsel ready to proceed with the trial of Dooley and wife versus United States of America; and Carroll, Hedlund & Associates, Inc., a Washington corporation?

Mr. Guimont: We are, your Honor.

Mr. Bateman: Defendants are ready, your Honor. Mr. Belcher, through the process of notification and re-notification, was missed, and he will be down just as soon as he can get here, but he asked that we proceed.

The Court: Very well, and do you agree to take care of whatever interest might be needful?

Mr. Bateman: Yes, your Honor, we are jointly associated in the defense of the case.

The Court: How long do counsel estimate the trial will take?

Mr. Guimont: Well, I would anticipate, your Honor, approximately a day. I hope that our case will be concluded in about three hours' time.

The Court: Mr. Bateman, would you make an estimate?

Mr. Bateman: I suggest, then, your Honor, that we should be through by tomorrow afternoon.

* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

I think my case will take about four or five hours to put on.

The Court: That sounds like at least two [7] days will be substantially consumed. In view of that, I wish first to see what we can do to obviate unnecessary time-consuming work in the case.

Have counsel met together with a view to trying to accomplish the results which might have been accomplished by formal pre-trial procedures under the rules providing for that?

Mr. Guimont: Yes, your Honor. I believe we have some agreements.

The Court: Have counsel tried to clear away the work that might be incident to bringing into the case proper exhibits?

Mr. Guimont: We have with respect to some of the medical expense, your Honor, and also with respect to some of the physical facts.

The Court: Do you know approximately how many physical exhibits the plaintiffs will wish to introduce in evidence?

Mr. Guimont: I would say eight or nine all told.

The Court: Consisting of what subject matter?

Mr. Guimont: Our exhibits will be billed, expenses of medical treatment, and also some pictures of the area involved.

The Court: Now, I am certain that those things [8] could be dealt with and should have been before this time in a final way.

(Francis N. Cushman, Assistant United States Attorney, at this time appeared on behalf of the Defendant United States of America.)

The Court: Mr. Bateman, what have you?

Mr. Bateman: May I say first, your Honor, we have agreed with counsel that counsel might introduce his medical bills without objection or without presenting proof or testimony as to reasonableness of them?

The Court: What about pictures?

Mr. Bateman: The pictures, the same, your Honor. We have stipulated the pictures might be introduced without the necessity of furnishing the photographer who took them.

The Court: That is what I mean.

Now, with respect to the defendants' exhibits, Mr. Bateman?

Mr. Bateman: We have three scale drawings that are pertinent, your Honor, which Counsel, I believe, has stipulated that we may introduce without producing the testimony of the engineer who drew them. It shows the apartment house project site that is involved here and then enlargements of that, showing the more limited area that is involved. [9]

We have pictures that we will offer in evidence of that site, and general area.

The Court: You mean photographs?

Mr. Bateman: Yes.

The Court: In addition to those drawings?

Mr. Bateman: Yes.

The Court: Do you have those drawings and pictures in mind?

Mr. Guimont: I do, your Honor.

The Court: Any objection?

Mr. Guimont: No objection.

The Court: What other kind of physical evidence would you seek to introduce?

Mr. Bateman: I believe, your Honor, that is the essence of it.

The Court: Then, I believe counsel has accomplished what the Court was talking about, and I hope that is true.

Then, is there anything else about physical exhibits that you think should be mentioned now so as to save time?

Mr. Bateman: We have agreed and heretofore have conferred about it that it may be stipulated that the Federal Housing Administrator, an Agent of the United States of America, is the owner of the Lake Burien [10] Apartments, and the real estate comprising that site which will be shown on one of the exhibits, which is a material element of the plaintiffs' case that we have agreed to stipulate to, and no proof need be offered of that fact.

The Court: Is that satisfactory?

Mr. Guimont: That is satisfactory. We also agreed that the agent, Carroll, Hedlund & Associates, are operating it for the Government.

The Court: Is that true?

Mr. Bateman: That is correct, your Honor.

Mr. Guimont: And we further have stipulated

that it won't be necessary for them to produce the Weather Bureau people to prove the time of daylight involved.

The Court: Do you wish the Court to understand that counsel on both sides have agreed that no such proof will be necessary, that there will be no excuse as to the hours of daylight on that day?

Mr. Guimont: That is right.

Mr. Bateman: Yes. I have the certificate from the Weather Bureau which I will physically introduce in evidence that will take care of that.

The Court: Do you have any objection to that?

Mr. Guimont: No objection.

The Court: Is there anything else, Mr. Guimont, that has not already been stated, physical evidence especially?

Mr. Guimont: We also agreed that counsel could introduce from the Lighting Division the facts concerning the lights being on at the time involved in this accident. Do you have that?

Mr. Bateman: I found, your Honor, in my investigation of that, that there is no way to present that except through calling a witness. There is no physical record of that having been made. The testimony will be very brief, however.

The Court: Anything else you think of? I am indulging these few moments with the hope of clearing away all of the unnecessary conflicts in the views of counsel in the case which sometimes in trials necessarily take up time.

Mr. Guimont: I believe that is about what we have agreed to.

I have put in a call for a doctor to appear at eleven o'clock.

The Court: As to doctors on both sides, the Court will try, if it is possible—we do not guarantee—but the Court will try to accommodate the [12] doctors when they get here. That relates to the doctors on both sides.

Mr. Bateman: I believe, your Honor, actually the pleadings are short in this case. The issues are rather confined, and I think that counsel and I have actually stipulated to everything that it is possible to stipulate to and during the course of the trial, should others matters arise, I, for one, will certainly be quick to alleviate any unnecessary delay.

The Court: Very well. May I interrupt then to ask Mr. Cushman,—he is the attorney for the United States of America, one of the defendants in this case—will he have any physical evidence like photographs or documents or maps or drawings or anything of that sort to offer, other than what Mr. Bateman and Mr. Guimont have been mentioning?

Mr. Cushman: No, your Honor, and I do not plan at the moment to take an active part in the case. Mr. Bateman will be handling it.

The Court: Is it your understanding that whatever Mr. Bateman says or does in this case, if pertinent to the position of the United States, may be taken and deemed by the Court to have been said and done on behalf of the United States as

well as on [13] behalf of Carroll, Hedlund & Associates, Inc.?

Mr. Cushman: Yes, your Honor.

Mr. Bateman: That is our understanding, your Honor. We arranged that.

The Court: Very well.

Is there anything else that should be cleared away?

If that is all, Mr. Guimont, it is in order for the plaintiffs to make plaintiffs' opening statement of what they think the truth will be in this case. May I remind counsel that if you wish to assist this Court—and I am sure you do—what we need and what we may appropriately receive under that heading is a brief, narrative outline by Counsel of what Counsel thinks the Court will hear in the way of testimony from the witness stand or will be advised of in the form of physical exhibits. Try carefully to avoid any comment on the effect of any evidence or on the weight of the personality or reputation or testimony of a witness.

Just relate in a very brief narrative outline what you think the evidence will be before the Court, and the same opportunity will be given counsel for the defendant at the proper time.

At this time, we will hear plaintiffs' [14] opening statement.

(Mr. Guimont opened the case to the Court in behalf of the plaintiffs.)

The Court: I will hear now or later, according to counsel's preference, the defendants' opening statement.

Mr. Bateman: May it please the Court, the defendants would like to reserve their opening statement.

However, at this time, may I introduce Mr. George Johnston of Carroll, Hedlund at counsel table, and Mr. Kelvin Greenstreet of the Federal Housing Administration, who are at the counsel table?

The Court: You may be seated.

Are there any other details before proceeding with the taking of the testimony?

If not, plaintiffs may call their first witness, or otherwise proceed.

Mr. Guimont: I will call Mrs. Rebar. [15]

PHYLLIS REBAR

upon being called as a witness for and on behalf of the plaintiffs, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Guimont): Will you state your name, please?

A. My name is Mrs. James Rebar.

Q. What is your own given name?

A. Phyllis.

Q. Where do you live now?

A. I live at 720 Southwest 146th.

Q. And where were you living in November of 1952?

A. I was living at Lake Burien Heights.

(Testimony of Phyllis Rebar.)

Q. And were you a neighbor at that time of Mrs. Dooley and Mr. Dooley?

A. Yes, I was.

Q. What apartment number were you living in?

A. I lived in apartment 104.

Q. And at what address?

A. At 13710-12th Avenue Southwest.

Q. Was that the same address that the Dooleys had?

A. Yes, it was. [16]

Q. Now, were they in apartment No. 101?

A. Yes.

Q. How long had you lived there up until November of '52?

A. Well, I moved there on March 10 of '52, so that would be about six months or not quite.

Q. And you were sitting there when the Dooleys moved in?

A. Yes, I was.

Q. Now, did you have occasion to observe the way in which the grounds were kept during the time you were there?

A. Yes, I did.

Q. How were they kept? Did they have a gardener, in other words?

A. Oh, yes, they had a gardener. They were planting this lawn, and they had these wires with the stakes planted in the ground to keep the children and the—well, just generally speaking—people off the lawn, so that it would grow properly.

Q. Now, what did you see or observe prior to the incident that Mrs. Dooley had there?

A. Well, I had seen very many times the wires being down, and the stakes being down, too, at

(Testimony of Phyllis Rebar.)

different places of the project where I lived. By looking [17] out the window, or maybe going to the store, I had noticed that.

Q. Were they repaired from time to time?

A. Well, at times, they were, and at other times, they were not.

Q. Did you ever see anyone repairing them?

A. I think I did, once. Maybe it was more than once, but I remember especially once.

Q. With reference to the time Mrs. Dooley had her trouble, when was it that you saw it repaired?

A. Well, I believe it was before it happened, the accident happened, but like I say, I have seen the wires down because I have come back from the store and have had to be fairly careful to walk in the center of the sidewalk so I wouldn't trip over the wire myself.

Mr. Bateman: May it please the Court, if I may interrupt? I move that the testimony of the witness be stricken unless it is shown that this is the area or the wire which is involved in this suit. I believe this project covered a large area, and that counsel should confine himself to that particular area.

The Court: Is there any reason why the Court should not sustain that objection and grant that request?

Mr. Guimont: Well, I feel, your Honor, that [18] just generally the condition of the premises is in issue, and the knowledge that the defendant

(Testimony of Phyllis Rebar.)

may have had or should have had can be brought out in this way.

The Court: I think the way it has arisen, the Court will not take the trouble to strike it.

I will say that if you can show it had nothing to do with this action, the Court will certainly not regard it and that may be a situation somewhat different than might be found if the fact-trier was a jury instead of the Court.

I assure you that I am not going to pay any attention to evidence that relates to some condition that had nothing to do with this accident.

If you can show on cross examination or otherwise by clarification that it is immaterial, I shall disregard it. Be careful, though, Mr. Guimont, in view of the objection now made, in the future questions to confine them to the conditions that related to this accident, not something around a large apartment house area, because we all know that in some of these housing projects, they cover acres and acres of ground. What might happen on one side of the property might not be at all pertinent to what occurred on the other side.

Mr. Guimont: That is true. [19]

Q. (By Mr. Guimont): Now, Mrs. Rebar, with reference to the particular area where your apartment was, what did you observe about the fencing or wire obstructions?

A. Well, just like I said, I had seen the wire down, and some other times I have seen it up, not in—well, in different spots.

(Testimony of Phyllis Rebar.)

Q. Was that surrounding or right in the immediate vicinity of the area of your apartment?

A. Yes.

Q. Now, what occurred the evening that Mrs. Dooley sustained an injury? Do you recall that evening?

A. Well, that evening, it was—I believe it was after six—Mr. Dooley knocked at my door or rung the bell, and I answered the door, and he asked me if my Doctor was open in the evenings, or if he could have the 'phone number, and I gave it to him, and I went over with him to see what the trouble was. I asked him, and he said Jean had an accident, and I went over to their apartment, which was right around the corner, and saw Jean sitting on the davenport with her foot propped up, and I could tell that she was in pain. I believe, at the time, I asked her how it happened, and I was so enthused about her leg that that is all I thought of at the time was just wires, how it [20] happened, that she stumbled over wires.

Mr. Bateman: I move the answer be stricken.

The Court: Yes. It may be stricken. I think you had better direct the witness by question and answer.

Q. (By Mr. Guimont): Now, you went into the Dooleys' apartment, then, did you?

A. Yes, I did.

Q. And you observed Mrs. Dooley?

A. Yes.

(Testimony of Phyllis Rebar.)

Q. And what was her general appearance at that time?

A. Well, she was in pain, by the look on her face.

Mr. Bateman: Conclusion of the witness.

The Court: Objection overruled and motion denied.

Q. (By Mr. Guimont): What was her general appearance at that time? Did you observe her leg?

A. Yes, I did.

Q. And what did you observe about it?

A. Well, I saw that her leg was propped up and——'[21]

Q. What was the color of it?

The Court: Did you see the leg about the knee, or did you only see the leg that was exposed below the normal position of her skirt?

The Witness: Well, I can't answer either way.

The Court: Very well. She can't answer. Ask her another question.

Q. (By Mr. Guimont): Now, did you get a Doctor for her, or do anything about it?

A. Well, when I was over there, I believe that at that time, Mr. Dooley called my Doctor. It was his day off, but I believe he called at his home, and, well, I think—and then he called another Doctor after that, because my Doctor was unable to assist, I believe.

I can't remember exactly, because I don't want to say anything that I am not sure of.

(Testimony of Phyllis Rebar.)

Q. Well, did you stay in the apartment there with her, or do anything for her then?

A. Well, I went upstairs to the apartment house to find someone that could help Mr. Dooley—to help Mr. Dooley take Jean out to the car to the hospital, because I figured he would need help. I asked first, and so I went upstairs to another apartment in the same [22] apartment house to get a man.

Q. And did you get him?

A. Yes, I did.

Q. And then, did you return?

A. Yes. I went back to my apartment. I had children.

Q. Did you see them take Mrs. Dooley to the car?

A. Yes. I looked out the window, and I saw Jean—I believe she was on his back. I believe that is how it was.

Q. Did they carry her out? A. Oh, yes.

Q. Two men?

A. Well, I think that—what I can remember—I believe Jean had her arms over his neck, I believe, and I can't remember what the other fellow was doing. I can't remember that, but I know that I saw them going out, because I looked out the window.

Q. Who looked after their children? Did the Dooleys have children there?

A. Yes. They had two little girls.

(Testimony of Phyllis Rebar.)

Q. And who looked after them when they went to the hospital?

A. Well, I can't remember. I don't know if the [23] mother-in-law was there yet, but I believe that one of the neighbors watched until the mother-in-law came or the mother-in-law came shortly after. I can't remember, but I believe one of the neighbors watched until the mother-in-law came.

The Court: Will you state, yes or no, as to whether you know the approximate age of Mrs. Dooley, Mrs. Jean Dooley, do you or not know the approximate age of Mrs. Dooley? Answer yes or no. You don't have to answer to something you don't know.

The Witness: I am not sure, no.

The Court: You may ask another question. Is she a younger person, or an older person, from your point of view?

The Witness: Mrs. Richard Dooley?

The Court: No, Mrs. Jean Dooley, the plaintiff in this action.

The Witness: I believe I am older than she is.

The Court: And approximately how old are you?

The Witness: I shall soon be 27.

The Court: And you think she is younger than you, is that your thought?

The Witness: A matter of months.

The Court: Very well, you may inquire. [24]

Q. (By Mr. Guimont): Then did you have occasion, Mrs. Rebar, to see Mrs. Dooley when she returned to the housing project?

(Testimony of Phyllis Rebar.)

A. Yes, I did.

Q. When did she return?

A. Well, I believe it was around ten days or—well, around that time, after——

Q. And did you call on her then?

A. Yes, I did.

Q. And what was her appearance then?

A. Well, she was unable to do anything.

Q. Did she have anything on her leg?

A. She had a cast on her leg.

Q. And how far did the cast extend?

A. I can't remember rightly but I believe it was—it seemed like it was up quite far. Like I say, it has been quite a long time ago, and I would hate to say, one way or the other.

Q. Now, was someone living with her at the time? A. Yes.

Q. Who was that?

A. Well, her mother-in-law stayed there and watched the children, and cared for her.

Q. Now, do you recall when the cast was finally removed? A. No, I don't.

Q. Prior to this accident, did Mrs. Dooley do all of her household tasks herself? A. Yes.

Q. And her washing? Are there washing facilities there? A. Yes, there is.

Q. And after the accident, did you see her doing any of that?

A. After the accident?

Q. Yes.

A. Well, not directly after, I don't know exactly

(Testimony of Phyllis Rebar.)

when it was, but I think I saw her once, but I can't remember. It was not directly after, because I know she wasn't able to get downstairs, but I know that her mother-in-law did the washing for her, because I used to see her in the basement.

Q. Now, did you observe Mrs. Dooley's walk? How she walked after this accident?

A. Well, after she had the cast off?

Q. Well, yes, after she had the cast off. Did you observe her walking?

A. Well, stiff-legged. I mean, she didn't put too much weight on that foot. [26]

Q. And you left in January, did you?

A. In January of 1954, this year, on New Year's Day.

Q. You moved from there?

A. Yes, I did.

Q. And up to that time, did you notice her walk and gait?

A. Well, I haven't seen too much of Jean recently after I left.

Q. I mean, before you left, did you observe?

A. Before I left?

Q. Yes.

A. Oh, yes, she walked sort of, I guess, with a limp.

Mr. Guimont: I believe that will be all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Bateman): Mrs. Rebar, you moved

(Testimony of Phyllis Rebar.)

from the apartment there in January of '54, did you not? A. Yes.

Q. However, Mr. and Mrs. Dooley moved out of your building in June of '53, did they not?

A. I believe it was around that time. I don't know exactly when, but they moved before I did to another [27] apartment house.

Q. So, after that, you didn't really see her very much, did you?

A. Occasionally, I did, yes. She used to bring the children over once in a while, very seldom, but I did.

Q. Did you say "very seldom"?

A. Well, I can't say just how often. I saw her maybe—the visit wasn't made to me, but to someone else.

Q. To someone else in the building?

A. Yes.

Q. You would see her just casually?

A. That is right.

Q. Did she carry her baby with her?

A. She had a stroller.

Q. Did you ever see her carrying her baby?

A. No.

Q. Did you ever see her take the child upstairs?

A. No. Pardon me. You mean upstairs, in the other apartment house?

Q. Yes. A. No.

Q. Did you ever see her take the child upstairs in the building in which you are living?

A. Oh, I see what you mean. I never saw [28]

(Testimony of Phyllis Rebar.)

her take the baby upstairs in our apartment house, but the one opposite from us—I can't remember, think—I don't know if I actually saw her take him up, but I think she did.

Q. Well, there are stairs up into all of those apartment buildings, are there not? A. Yes.

Q. And there is a second story in all of those apartment buildings, is there not?

A. Two stories.

Q. And did Mrs. Dooley live on the second floor of the building in which you were living?

A. First floor.

Q. Do you know what floor she lived on in one of the other buildings now?

A. The first floor.

Q. And there are steps down to the basement, are there not, in those buildings? A. Yes.

Q. And up until June of '53, Mrs. Dooley was carrying her child, wasn't she?

A. Well, I don't know how soon after she moved that I saw her. Maybe I would see her if I was looking out the window checking my children. I may have seen her with the baby in the buggy. I can't remember. I can't [29] say for sure, because I don't remember.

Q. From the time of this accident in November of 1952, until June of 1953, Mrs. Dooley was carrying her child, I mean the child that was just born in June of 1953,—that so?

A. When I saw Mrs. Dooley, when I did see her, she had, I believe, a buggy with the baby.

(Testimony of Phyllis Rebar.)

Q. She wasn't carrying her unborn child in a buggy?

A. Well, that is what I mean. I can't remember. I don't remember. That is why I would rather not say something I don't know.

The Court: The way to dispose of it, if I may make a suggestion, is, if you know the answer, proceed to state it as best you can. If you feel that you do not know the answer, with sufficient certainty to make a statement of fact about it, just say: "I do not recall", or something to that effect. That will save time, and also you are expending unnecessary effort.

Q. (By Mr. Bateman): Did you talk with her?

A. Yes.

Q. On the evening that this accident occurred, Mrs. Rebar, did you talk with Mrs. Dooley herself?

A. Yes. [30]

Q. What was the general subject of your conversation with her?

A. I believe I asked her how it happened.

Q. You talked about how the accident occurred?

A. Well, when you see someone sitting there when they had an accident, naturally you are curious to know how it happened.

Q. So you talked to her personally about how it occurred? Is your answer "yes" to that?

A. Yes, I believe I did.

Q. She was not unconscious then?

A. No.

(Testimony of Phyllis Rebar.)

Q. She was sitting on the davenport, did you say? A. I believe it was the davenport.

Q. Was she covered with blankets or anything of that kind?

A. I can't say, because I don't remember.

Q. Was there anyone else present besides you and Mr. Dooley?

A. I believe one of the other neighbors.

Q. Do you know who that was?

A. Yes, I do.

Q. Who? [31]

A. Mrs. Joy Skewes.

Mr. Bateman: No further questions, Your Honor.

Mr. Guimont: That will be all.

May this witness be excused, Your Honor?

Mr. Bateman: Yes.

Mr. Guimont: She has some young children.

The Court: Mrs. Rebar may be excused, and she may go on about her own business, if that is her wish.

(Witness excused)

Mr. Guimont: Now, I will call Mrs. Dooley.

MRS. DOROTHY DOOLEY

upon being called as a witness for and on behalf of the Plaintiffs, and upon being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Guimont): Would you state your name, Mrs. Dooley?

(Testimony of Mrs. Dorothy Dooley.)

A. Dorothy Dooley, Mrs. Dorothy Dooley.

Q. And what is your relation to Jean Dooley?

A. I am her mother-in-law.

Q. And Richard Dooley is your son? [32]

A. My oldest son.

Q. Where do you live, Mrs. Dooley?

A. I was living at 1327 Valley when the accident occurred. I am now living at 4618 West Marginal Way.

Q. And what is your occupation?

A. Saleslady and demonstrator.

Q. And were you employed in November of 1952?

A. Yes, by Frederick & Nelson, demonstrating housewares.

Q. And what were your earnings from that employment? A. Fifty dollars a week.

Q. And do you recall the location of your son and his wife's home?

A. Very well. I was there on the average of two to three times every week in the evening.

Q. And prior to Jean's accident, did you call on them regularly?

A. Quite frequently, because they had a younger baby, and I used to go out to take the older one out for air and exercise, to carry.

Q. Now, was there anything wrong physically with Mrs. Dooley, Jean Dooley, prior to this accident? A. Not to my knowledge.

Q. Did you have occasion to go out there the evening that Mrs. Dooley was injured?

A. I had just gotten home from work, and I

(Testimony of Mrs. Dorothy Dooley.)

was having dinner, and I thought that I would call, and my son said: "Hang up the telephone. Jean just broke her knee." Immediately I hung up, of course. There was a lady living with me at the time. I started dressing, and I got out as fast as I could get out, to see how bad the accident was.

Q. And when you got out there, Jean was still there?

A. She had gone to the hospital, and this neighbor,—I believe their name is Skewes—anyway, we all call her "Joy"—she was with the children when I got there.

Q. And then, when you got there, did you take over? A. It was the only thing to do.

Q. What did you do about your job?

A. I waited until the following morning, and called the Medical Center at Frederick & Nelson and told them that I could not come back because my daughter-in-law was in the hospital and somebody had to take care of the children.

Q. How long did you stay and look after the children? [34]

A. I was there, day and night, from November 5 in the evening until December 18, and after that, I commuted for a few days back and forth, but I was there steady every night from the 5th of November to the 18th of December.

Q. And did you maintain your own housing at the same time?

A. I kept my apartment up for some months, for six weeks, until I was able to move it.

(Testimony of Mrs. Dorothy Dooley.)

Q. Did you discuss with Mr. and Mrs. Dooley your expense in the matter?

A. I had a natural expense, yes, of keeping up my apartment and light and telephone.

The Court: Mrs. Dooley, the question was, did you discuss that?

The Witness: Yes.

Q. (By Mr. Guimont): And did you agree on any figure that you felt they should pay you for your staying with the children?

A. They said they were willing to pay whatever was reasonable.

Q. And what did you agree was reasonable?

A. We decided on \$25.00 per week.

Q. For how long? [35]

A. A week.

Q. And how many weeks were you there?

A. I believe it was six weeks from November 5 until December 18.

Q. Now, have they paid you the money you agreed upon? A. No, sir.

Q. Did you expect to be paid? A. Yes.

Q. Do you feel that is a reasonable amount?

A. I do.

Q. Mrs. Dooley, when did Jean come home?

A. I didn't write it on the calendar, but it was either the 9th or 10th day, following the accident.

Q. Then, when she came home, was she able to assist in the care of the family?

A. Not at all.

(Testimony of Mrs. Dorothy Dooley.)

Q. What was her appearance when she came home?

A. Well, she was quite pale, and very, very nervous through medicine she was taking for pain.

Q. And did she make complaint at that time to you about her condition? A. Yes.

Q. What were those complaints generally?

A. That she couldn't stand it, whether she was laying down or trying to sit up, that the pain was intolerable, and it was just driving her out of her mind, and she took some sort of pills that the Doctor gave her to relieve that pain, and took them consistently.

Q. Now, did she have a cast on? A. Yes.

Q. And how long do you recall having seen her with the cast?

A. I believe that she went back four weeks following her return to see the Doctor. Whether he removed all of the cast at that time, I can't say. I think he removed part of it, but it was at least four weeks afterwards.

The Court: After she returned?

The Witness: Yes.

Q. (By Mr. Guimont): And how often did she return to the Doctor during that four weeks' period?

A. I can't answer that accurately, because I didn't write it down. I know that she was in touch with him all the time, and she went back several times, but whether it was two times or three times, I couldn't make a statement.

Q. Now, did you notice any improvement in her

(Testimony of Mrs. Dorothy Dooley.)

condition, her nervousness, and the like, while you were living at the home?

A. Her nerves were very, very bad, and after my six weeks there, I used to go up practically every day because I felt being on her——

The Court: Now, Mrs. Dooley, you are not answering the question. Read the question.

(Last question read by the reporter.)

A. No.

Q. (By Mr. Guimont): After the time you stayed in the home, did you return and see Mrs. Dooley from time to time? A. Yes.

Q. And about how often did you return?

A. Almost every day, until Christmastime.

Q. And during that period of time, what was Mrs. Dooley's condition?

A. She was very nervous, and very exhausted from being on her feet in the care that she had to take care of the children.

Q. How was her leg at that time? Did you notice? A. It was quite swollen.

Q. Where was the swelling?

A. In her kneecap. [38]

Q. And the cast was off at that time, was it?

A. Yes.

Q. Did you thereafter visit, also?

A. Yes.

Q. And about how often did you see the Dooleys from that time on?

A. After Christmas, I went out about two or —about every other day—to take care of the wash-

(Testimony of Mrs. Dorothy Dooley.)

ing and help with the washing, because I didn't return to steady employment until about the 15th of January.

Q. And then after you returned to steady employment, did you visit there?

A. I went out in the mornings. My employment was late afternoon and evening. I used to go out there in the mornings.

Q. And how often, is what I am trying to get at.

A. About twice a week after I returned back to work.

Q. And has that relationship continued up to now? A. Always has, yes.

Q. What is the appearance of her leg? Have you seen her leg? A. Yes.

Q. What is the appearance of it?

A. There is quite a bad scar on the knee, and her ankle used to swell at times periodically.

Q. Have you observed that swelling, yourself?

A. Yes.

Q. And when is the latest that you observed the swelling?

A. The latest that I observed it being swollen was in the summer.

Q. This last summer?

A. The summer months, yes, when she was on her feet a long time, it would swell.

Q. How did she walk during all of the time immediately after and on up until now?

A. With difficulty, because her knee was stiff.

Q. And have you observed her walking recently?

(Testimony of Mrs. Dorothy Dooley.)

A. Yes.

Q. Is there any improvement in the walk?

A. There is some improvement, but it is stiff when she goes up and down steps. She has to walk with care.

Q. Prior to the incident when she was injured, had you been out to visit there often? A. Yes.

Q. And did you have occasion to observe the grounds immediately surrounding their apartment?

A. Yes.

Q. What have you observed about that prior to this [40] accident, particularly with reference to the date of the accident, which I believe was on November 5 of 1952?

A. The wires had been put up after the lawns were in, but they were loose many times, laying loosely on the ground, and the stakes partly leaning over, and the wires sometimes touch the ground, depending on which way the stakes were pushed.

Mr. Guimont: I would ask to have this identified.

The Court: The Clerk will mark the exhibit as Plaintiffs' Exhibit No. 1 for identification.

(Photograph marked Plaintiffs' Exhibit 1 for identification.)

The Court: I wish Counsel would do their inspecting of that exhibit and expedite the matter. I understood there was no particular concern about the exhibit, and I will ask the counsel offering to state what it purports to show or ask the witness what it purports to show.

(Testimony of Mrs. Dorothy Dooley.)

Q. (By Mr. Guimont): Does that exhibit No. 1 disclose the area involved where you have been informed Mrs. Dooley fell? A. Yes.

Q. And with reference to that particular area, Mrs. Dooley, did you at any time prior to the occasion of Jean's fall, did you observe that condition of the wire at that location?

A. There was a loose wire at that telephone pole that I curled up on occasions because Kathy, the little girl, she used to run to the sandbox and play, and I was afraid the end of the wire would hurt her, or would hit her in the eye, perhaps, and I used to curl it up next to the pole.

Q. How many times did you do that, if you recall?

A. Upon more than several occasions, because whenever I took her to the sandbox, I was afraid of the wire, and I used to push it up next to the pole, or push it out of the way.

Q. And did you find that wire on occasion across the sidewalk?

A. Dangling in the corner of the walk there, yes.

Q. Now, where is the sandbox with relation to that telephone pole that is pictured there?

A. Across the walk from the pole.

Q. Do you know how wide that walk would be?

A. I never had occasion to measure the walk, but I would say the average width—probably three feet. I [42] am sure it is about the regular size of a walk.

Q. Now, with reference to the Dooley apart-

(Testimony of Mrs. Dorothy Dooley.)

ment, about how far is that telephone pole and that area from their apartment? A. In distance?

Q. In distance?

A. It is hard to approximate, because these poles are at the rear of the building, the corner of the walk.

Q. Well, from the rear of their building, 50 feet, 25 feet, 75 feet?

A. Probably—I hate to make an answer—from their corner of their building, probably 50 feet, 45 or 50 feet.

Q. About the length of this room, would you say?

A. Approximately. There are two apartments in that side. That is a hard question.

Q. Would you be able to tell us approximately when you first observed that wire was dangling or loose?

A. It was in September and October, because they were very nice warm days, and I used to go out and take the little girl out, as I said before, for her exercise at the sandbox and playing, so it was in September and October. If the weather was nice, on nice days, I took her out, and those were the days I seen them quite often.

Q. At that time, was there a planting in the yard of grass?

A. The lawns were all put in in the summer.

Q. Had the grass come up at that time?

A. It had very good growth.

(Testimony of Mrs. Dorothy Dooley.)

Q. Who used the lawn? Did they permit anyone to use the lawns?

A. The wires were put up to keep people off the lawn, but the children ran across them repeatedly. All the children played inside and outside when I was out there.

Q. Were there a lot of children in the vicinity?

A. Quite a number.

Q. And is that in the vicinity of the Dooleys' apartment?

A. Immediately around their apartment.

Q. How many apartment buildings were in the project as far as you know?

A. I would be unable to answer that. It is a large——

Q. Were there more than two?

A. There were quite a good many. I wouldn't [44] be able to say how many. There were dozens.

Q. Dozens? A. I would say so.

Mr. Guimont: I believe that will be all.

Cross Examination

Q. (By Mr. Bateman): Mrs. Dooley, your daughter-in-law was pregnant from November, and shortly before, until June, when her baby was born, is that not true? A. Yes.

Q. Pardon me?

A. She was pregnant, yes, until June.

Q. And she also had two younger children, did she, at that time? A. Yes.

Q. How old were those young children?

(Testimony of Mrs. Dorothy Dooley.)

A. Their ages then or now?

Q. Their ages at the time of her fall.

A. Jean hurt her knee on November 5, and Kathy was two on November 30. Maureen was one year old in January. Maureen was nine months old, approximately, nine months old.

Q. So, at the time then that you went out there at the home to stay with her, she had two children, one nine months old and one two years old? [45]

A. She wasn't two years old yet, almost two years old.

Q. And she was pregnant? A. Yes.

The Court: Just a moment. Will you read the last two questions and answers?

(Last two questions and answers read by reporter.)

The Court: January of what year, Mrs. Dooley?

The Witness: The year of the accident, 1952.

That would make Maureen one year old on January, '53.

Q. (By Mr. Bateman): Then, to be sure I understand you, at the time that you went out there on the evening of November 5, Mr. and Mrs. Dooley, your son and daughter-in-law, then had two children, one aged nine months, and the other aged two years, less a few days? A. Yes.

Q. And Mrs. Dooley was in the hospital for approximately ten days and returned home?

A. Either nine or ten days, yes.

Q. And you stayed with her then at the home there from November 5 until December 17?

(Testimony of Mrs. Dorothy Dooley.)

A. I believe it was the 18th, but whatever——

Q. 17th or 18th? A. Yes.

Q. And after that, you left?

A. I returned every day.

Q. You left and returned to your own apartment? A. Yes.

Q. Coming back then daily until about Christmastime? A. Up until Christmas.

Q. And after Christmas, you came back every other day or so?

A. Yes, because my employment was from four in the afternoon.

Q. Now, during that period then from the time of this accident until June, Mrs. Dooley in addition to having these two small children to care for, was pregnant, is that correct? A. That is right.

Q. Was her husband living there in the apartment at that time?

A. He was living with her except for the times he was out of town working.

Q. What was his work?

A. He is an iron worker.

Q. Was he out of town a good deal?

A. Quite often.

Q. So, substantially a good deal of time during that period, she was able to take care of these two small babies, and in addition, be under the handicap of being pregnant, is that correct?

A. He wasn't out of town after the accident. His out-of-town work came in the summer. Following the accident, he wasn't out of town.

(Testimony of Mrs. Dorothy Dooley.)

Q. At all?

A. I can't give you a specific number of days.

Q. He was out of town some of the time?

A. No. He was—I don't believe that he was out of town for at least three months or four months after the accident.

Q. But you don't know?

A. There was a short period that he was away, but I can't tell whether that was before or after.

The Court: Mrs. Dooley, state, if you know, what Mrs. Jean Dooley's approximate age was at the time of the accident.

The Witness: 26, I believe.

The Court: You may inquire. [48]

Q. (By Mr. Bateman): Was there any reason why you left the apartment there on December 18 when you did?

A. I had some unpaid bills that hadn't been taken care of. I don't have a checking account. I had to take care of a little business of my own, and I returned as often as possible, to help her.

Q. You didn't live there any longer?

A. Not permanently.

Q. Do you have just the one child, Mrs. Dooley?

A. I have two sons.

Q. When you were carrying those infants, did your ankles ever swell?

A. My feet. Being on my feet was quite hard work. It was very hard on me. In fact, I had to go to my Doctor afterwards.

Q. In this apartment project, there is a large

(Testimony of Mrs. Dorothy Dooley.)

amount of lawn area, is there not? A. Yes.

Q. You would describe it as a very extensive lawn planting? A. I would say so.

Q. And during the occasions while that planting was being done, and for the months thereafter, were those areas all perfected with similar fences to this kind that [49] was along the sidewalk where your daughter is supposed to have fallen?

A. Immediately around her apartment there were wires on stakes loosely.

I can't say the whole area, because I didn't go over the whole area.

Q. Did you ever report to the management of the apartment project there, the distance of this wire you have referred to on this telephone pole?

A. I didn't live there, so I didn't make any report. I did report to the people around there, because I fell over them once, myself.

Q. Do you know who you reported that to?

A. Pardon?

Q. Do you know the names of any of the people you mentioned that to?

A. To Mrs. Rebar and to Mrs. Joy Skewes I mentioned it many times, because they were loose and very easy to fall over.

Q. Did you mention it to your daughter-in-law?

A. Many times.

Mr. Bateman: No further questions.

The Court: Any further questions of this witness?

Mr. Guimont: I want to ask her a few questions.

(Testimony of Mrs. Dorothy Dooley.)

The Court: Well, I thought we would be finished in a moment. Those connected with this case are excused about ten minutes.

(Recess.)

The Court: Will you resume the witness stand for further interrogation, Mrs. Dooley?

Mr. Guimont: Your Honor, I have a Doctor who is present now.

The Court: I will then accommodate the Doctor at this time.

DR. PAUL E. RUUSKA

upon being called as a witness for and on behalf of the Plaintiffs, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Guimont): Will you state your name, Doctor?

A. Paul E. Ruuska.

Q. Doctor, where do you reside?

A. Mercer Island.

Q. And do you have offices in the City of Seattle? A. I do. [51]

Q. Where are those offices?

A. In the Medical-Dental Building.

Q. Doctor, are you duly and regularly licensed to practice medicine and surgery in the State of Washington? A. Yes, I am.

Q. Where did you receive your medical education, Doctor?

Mr. Bateman: We will admit the Doctor's qualifications.

(Testimony of Dr. Paul E. Russka.)

Mr. Guimont: Thank you.

Q. (By Mr. Guimont): Where did you receive your medical education?

A. I went to the University of Oregon Medical School from 1936 until 1940 and received my M.D. degree in 1940.

I interned for one year at the Good Samaritan Hospital in Portland, Oregon. I then went into the Service and spent a little over four and one-half years in the Service in a General Hospital as an orthopedic surgeon.

Following discharge from the Service in 1946, I spent one year at the Children's Orthopedic Hospital in Seattle, Washington. [52]

Following that, in 1947 I went to the New York Orthopedic Hospital for a Junior Fellowship, and in 1948 I had the Senior Fellowship at the New York Orthopedic Hospital.

Q. Did you have any specialty, Doctor, in your profession?

A. Yes, I do only orthopedic surgery, and I have qualified for the American Board of Orthopedic Surgery in 1950.

Q. And, Doctor, did you have occasion to see and treat Jean Dooley? A. Yes, I did.

Q. Of this City? A. Yes.

Q. And when did you first treat Mrs. Dooley, and for what?

A. I first saw Mrs. Dooley at the Maynard Hospital on November 5. She was referred to me by

(Testimony of Dr. Paul E. Russka.)

another physician, and at that time, she had sustained an injury to her knee.

The Court: That was November 5, is that right?

The Witness: I believe that is right.

The Court: What year?

The Witness: 1952. [53]

The Court: You may continue.

A. (Continued): And at the time that I saw her, she had an obvious injury in the region of the knee.

Q. Was that the left knee, Doctor?

A. Yes, the left knee. There was marked swelling and considerable tenderness, and shortly after I saw her, the X-rays of the left knee were made in Maynard Hospital, and on reviewing those, there was a transverse fracture of the kneecap on the left side.

Q. And, Doctor, what was the next step you took?

A. Because of the marked swelling and discomfort at the time, I applied a small cast just to make her comfortable for the time being, and we scheduled her for an operation, in which we were to replace the kneecap fragments into good position, and we scheduled this operation for November 8th, 1952, and performed it on that date.

Q. What was the reason, Doctor, for the three-day delay?

A. Mostly to allow the swelling to subside and allow the patient to recover more or less from the

(Testimony of Dr. Paul E. Russka.)

shock of the injury, and adequately prepare her for the surgery.

Q. What was her condition, mentally and physically, at that time?

A. Well, attendant to the fracture, of course, [54] was considerable pain. The patient was somewhat apprehensive, was very nervous, and it was felt best to give her something to more or less console her nerves, and, as I say, prepare her for the operation.

Q. Did you have a history of what had precipitated this condition? A. The injury?

Q. Yes.

A. Well, the history that I obtained was that Mrs. Dooley was running and tripped over a wire, and as she described it, fell through the air and struck on the point of the knee, causing the injury, and immediately following that, was brought to the hospital.

Q. And the condition which you treated her for and found, did you attribute that to that type of injury that she related she had?

A. Yes, sir.

Q. Doctor, what was the surgical procedure following on the 8th of November?

A. Upon November 8th, I made an incision about six inches in length, and made a dissection down to the kneecap. I then split the fibres of the heavy tendon lengthwise and peeled them back, and saw the broken area of the bone. On opening this space, considerable blood could be seen in the knee joint,

(Testimony of Dr. Paul E. Russka.)

and this was thoroughly [55] washed out of the knee joint proper.

Following this, we were able to line up the fragments in good shape, and I then placed two drill holes through the lower segment and two drill holes to the top fragment, and wound a heavy piece of suture material through all four of the drill holes and then tied them up securely, holding the fracture fragments in place.

Following that, the structures superficial to the kneecap were then again sutured into their proper place, and a dressing was placed over the knee.

Following this, a cast which extended from the toes to the upper third of the groin was put on, holding the knee in very slight flexion.

Q. Now, how long, approximately, was she hospitalized, Doctor?

A. She was hospitalized about nine days, in that vicinity.

Q. And then, did she visit at your office?

A. Yes. I saw her on frequent occasions after that. I saw her on November 22, December 6th, at which time I removed the cast.

On December 15, there was a little area of the wound right in the middle of the wound that was—what we say—granulating. You might say it showed a [56] proud flesh.

The Court: Will you wait just a moment? Please read the last answer.

(Last answer read by the reporter.)

The Court: You may resume the answer if I

(Testimony of Dr. Paul E. Russka.)

have interrupted you, Doctor, and if not, you may ask another question.

A. (Continuing): This was treated by a dressing. Then, on December 15, I referred Mrs. Dooley to the office of Mrs. Erma Myers, who is a physical therapist, for the purpose of heat treatments, massage, and exercises to the knee, which are important for the recovery of the knee motion following this type of an injury. I have since then seen Mrs. Dooley on five occasions, and the last time was on March 8th, 1954.

Q. That was just before this trial?

A. Yes, sir.

Q. Now, Doctor, what would the swelling indicate to you?

A. When? At the time of the injury?

Q. At the time of the injury.

A. Well, it indicates contusion to the area that was injured, and, as we almost always expect, blood in the knee joint. [57]

Q. Now, what complaints did she make to you at that time, when you first saw her, that is November 5, 1952?

A. Extreme pain, and extreme apprehension.

Q. Was she able to give you a calm story of the matter?

A. Well, no, I wouldn't say it was calm. She was having terrific pain when I first saw her, and any slight motion, of course, was painful, and there is considerable muscle spasm when the joint is injured.

(Testimony of Dr. Paul E. Russka.)

Q. Does that corroborate her complaint of pain, spasm? A. Oh, yes.

Q. What did you observe about her general condition subsequent to your operation on her knee?

A. Her general physical?

Q. Yes, her mental and physical.

A. Well, at the time that I first saw Mrs. Dooley, she was referred by Dr. Layton, who is an obstetrician, and Dr. Layton informed me that Mrs. Dooley was pregnant, and she carried through the pregnancy following the knee injury.

On the several occasions that I saw her, she was considerably nervous, was very apprehensive even about my feeling the knee, apprehensive about bending [58] it, and quite nervous throughout the course of this injury.

Q. This nervousness, and the like, was there any connection between that and the fall that she had, do you think?

A. Yes. A certain amount of this nervousness was precipitated by this injury, which was a rather severe injury.

Q. Now, with reference to the severity of the injury, how would you compare this injury that you treated her for, for instance, with a fracture of the tibia, or one of the bones in the leg?

A. Well, that would depend. A fracture of the tibia that would enter the knee joint would be an extremely serious injury. On the other hand, a fracture of the tibia which would occur, we would say, in the middle of the shaft would not involve the

(Testimony of Dr. Paul E. Russka.)

joint, and as happens in this case, the knee joint is the largest joint in the body and the most complicated joint in the body, and, therefore, there is considerably more to deal with from the standpoint of treating it and getting the knee to function afterward.

Q. Would a good alignment of the patella—that is the joint involved, the bone involved in the fracture, is it not? [59]

A. Yes, sir.

Q. Would a good alignment of that necessarily be a permanent recovery in an area such as the knee?

A. Well, a good alignment of the patella is practically mandatory, and that is why I elected to open it, so that I could see what I was doing. If you don't get good alignment, it causes a roughening on the under surface of the kneecap which, of course, glides over the joint, actually is in continuity with the knee joint proper, and any roughness there will lead to after effects.

Q. Now, was there any evidence of other injury to the area besides the fracture itself?

A. Only the bleeding into the knee joint and the contusion of the tissue in front of the kneecap.

Q. Would there be tissue injury and damage in that area? A. Soft tissue injury, yes.

Q. And is that disabling, Doctor?

A. That would be more or less of a temporary thing, in my opinion.

Q. What, Doctor, is your prognostication of the

(Testimony of Dr. Paul E. Russka.)

permanency of this injury that Mrs. Dooley has sustained, if any?

A. Well, I think that she has some permanent disability in this instance, because of the fracture entering the joint. I think there is a probability that she will have aching in the joint, some swelling. It is extremely hazardous to say what she is going to have twenty years from now, but I believe that she will develop a so-called arthritis in that knee sooner than she would in a normal knee.

We know definitely that there is such a thing as traumatic arthritis when a break occurs into a joint.

Q. And that is the type of break this is?

A. That is the type of break this is, and that is what I would have reason to expect.

Q. Doctor, in the last examination you made of Mrs. Dooley, did you take an x-ray picture to show the alignment of the knee?

A. Yes. I took an x-ray picture. I took one on December 15, which revealed to me the position of the bones.

Mr. Guimont: May we have that marked, please?

The Witness: There are two of them here. One doesn't contribute much because it is a front view. Do you want that, too?

Mr. Guimont: Well, I believe just the one that you would like to comment on.

(X-ray marked Plaintiffs' Exhibit 2 for identification.) [61]

The Court: We will have to take the recess at noon, having in mind the witness' convenience.

(Testimony of Dr. Paul E. Russka.)

Mr. Guimont: I am about finished.

The Court: I mentioned that so that Counsel can have in mind the witness' convenience.

Q. (By Mr. Guimont): What is significant, Doctor, with reference to that x-ray picture, Exhibit 2?

A. This is a lateral radiograph of the left knee, taken on December 15, on Mrs. Dooley, and it reveals some mottling of the kneecap, some absorption of bone, which we always expect in a fracture, but it reveals the fracture line going across the bone, and there is perhaps just a very slight offset at the site of the fracture on the under side of the kneecap.

The Court: Repeat the date of the taking of that x-ray.

The Witness: December 15, 1952.

Q. (By Mr. Guimont): That was subsequent by a month to your original operation?

A. Yes, about five weeks.

Q. Now, that roughening, will that probably cause some continued difficulty in the future? [62]

A. That is the only thing that would cause the difficulty, that is, the roughening on the under side of the kneecap.

Q. Doctor, did you bring with you your statement of your charges that were made for treating Mrs. Dooley?

A. I have a copy. I believe this is a copy of my bill.

(Testimony of Dr. Paul E. Russka.)

Mr. Guimont: I will ask that that be marked and introduced.

(Doctor's bill marked Plaintiffs' Exhibit 3 for identification.)

Q. (By Mr. Guimont): What are those charges, Doctor?

The Court: It is customary to let the opposing counsel see specifically what each exhibit is, and if it appears that he is familiar with it——

Mr. Bateman: We have no objections to the entry of that, Your Honor.

A. The charges up until——

Q. Just the full amount. Is it \$240?

A. \$225.50.

Q. And then did you have a charge for your last——

A. Then there is—we use a standard King County charge for the x-rays. I can't tell you what that would be. I don't have that right now.

The Court: Is it in addition to that exhibit?

The Witness: Yes. It would be in the vicinity of perhaps ten dollars.

Mr. Guimont: We offer that.

Mr. Bateman: I have no objection.

The Court: Plaintiffs' Exhibit 3 is admitted.

(Plaintiffs' Exhibit 3 received in evidence.)

Q. (By Mr. Guimont): Those are reasonable charges, are they not, Doctor? A. Yes, sir.

Mr. Guimont: I believe that is all.

The Court: You may cross-examine.

(Testimony of Dr. Paul E. Russka.)

Cross Examination

Q. (By Mr. Bateman): Doctor, you described from the x-ray the roughening as very slight on the under side of the patella?

A. The deformity is slight.

Q. In other words, you would consider that to be a very excellent result, would you not? [64]

A. I think I did a pretty good job, yes.

Q. And it is so, is it not, that many people sustain such injuries to the kneecap resulting in a greater roughening or offset than is present here, without ever acquiring any arthritic joint?

A. I find that difficult to answer. I feel that when a break occurs into a joint, and if it would be more rough than this, I would expect trouble.

Q. If it was rougher than this? A. Yes.

Q. But now, is it not a fact that in many cases, frequently no such trouble ever develops?

A. No, because from kneecaps, we have lots of mischief, and if we don't get them well into position, we simply have to scoop the whole kneecap out. I think in this instance, we are talking about a very particular type of fracture. That is why I would like to clarify these things.

The Court: Just try to give your information as related to this condition that is here present, and do not spend too much time comparing it with others which might involve a different situation.

Q. (By Mr. Bateman): Doctor, assuming you are finished, it is true, is it not, that a result such as this, in a fracture of this type in many instances

(Testimony of Dr. Paul E. Russka.)

will [65] result in no future difficulty with the knee joint of an arthritic nature? A. It can.

Q. When you stated that you had last examined Mrs. Dooley on March 8, 1954, that is just the first part of this month, that was preparatory to this trial, was it not, for your appearance here?

A. Yes, it is a follow-up.

Q. When was the last time prior to that that you had seen her?

A. The last time prior to that was in August, 1953.

Q. And prior to that time? A. April, 1953.

Q. And those visits were just follow-ups, were they? A. Yes, sir.

Q. Was there present any arthritis in the knee-joint when you examined her on March 8th?

A. On March 8th, when I examined her and moved the kneecap over the knee joint proper, there was some crepitus or grinding, a grating sensation, under the kneecap. There was some limitation of motion. The patient could flex the knee down to 70 degrees, which represents some limitation of motion.

The Court: What is normal?

The Witness: That depends to a certain extent. For a young lady her age, I would expect it to go down to approximately 50 degrees normally. There was one-half inch of atrophy or wasting of the muscles of the left thigh as compared with the right thigh.

Q. Now, those conditions are simply indicative of the fact that she does not need the full flexion—

(Testimony of Dr. Paul E. Russka.)

I believe you referred to that—of the knee in her normal daily life, is that not so, rather than any malcondition of the muscles?

A. Yes. I am citing here—I possibly have a little more than 70 degrees, but I think that she can get along with that amount.

Q. You stated that you had talked to and taken a history of how this occurred from Mrs. Dooley?

A. Yes, sir.

Q. Did you give a report of that to Mr. Guimont here?

A. Yes. I wrote Mr. Guimont a letter.

Q. Did she state to you in giving her history that she had injured her knee when she was running from her home, and she tripped across a wire stretched tightly between two stakes?

A. I believe that is what was told. [67]

Mr. Bateman: No further questions.

Redirect Examination

Q. (By Mr. Guimont): When did you take the history down, Doctor?

A. The history that I obtained from Mrs. Dooley was entered into the hospital record.

Q. That would be the night that she was admitted there?

A. Yes. I customarily make a note. Now, I don't remember whether I did or not.

Q. And is that an informal resume?

A. Very informal.

(Testimony of Dr. Paul E. Russka.)

Q. You just find out approximately how it did occur? A. How, when and where, roughly.

Q. Did you recall her telling you that she fell across a stretched wire?

A. That is what I said in my letter here. I don't remember whether it was a wire.

Q. Did you get the details of it? Did you ask her the details?

A. No, I didn't bother any further about the details than that.

Q. Just put that down. Did you dictate that to someone else, Doctor? [68]

A. No. I wrote it in the hospital record.

Q. And when she told you that, what was her condition at that time?

I mean, when she told you the history how was she——

The Court: (Interposing) Don't you think you have gone into that? He spoke about her being nervous.

Mr. Guimont: I appreciate that.

Q. (By Mr. Guimont): Counsel inquired of the comparison—he inquired, “Isn't it true that some people with more serious gratings in their kneecap and more serious roughening sometimes don't have any trouble in the future, is that right?”

I believe you said—I don't think you answered the question. Do they, or don't they have difficulty in the future?

A. It is hard to tell. Frequently a patient will have a rather catastrophic accident and come out of

(Testimony of Dr. Paul E. Russka.)

it feeling rather good. I am not smart enough to answer that question. I think it can happen.

Q. What are the probabilities where a joint, such as this knee joint, is involved with reference to the future troubles that may occur? What are the possibilities?

A. The probabilities are that they will have some joint aching and pain and arthritic symptoms even years after the accident.

Mr. Guimont: I believe that will be all.

Mr. Bateman: No further questions.

The Court: You may step down.

(Witness excused)

The Court: You may call the plaintiffs' next witness or otherwise proceed. Would you like to recall Mrs. Dooley who was on the stand, to finish her testimony?

Mr. Guimont: Yes.

The Court: Did you wish, while the Doctor was here, to offer the x-rays?

Mr. Guimont: We wish to offer the x-ray picture.

The Court: Any objection?

Mr. Bateman: I would like to see it.

Mr. Guimont: Will you please mark this?

(Three photographs marked Plaintiffs' Exhibit 4 for identification.)

Mr. Bateman: Defendants have no objection to Plaintiffs' Exhibit 2. [70]

The Court: Plaintiffs' Exhibit 2 is now admitted.

(Plaintiffs' Exhibit 2 received in evidence.)

The Court: You may now proceed.

MRS. DOROTHY DOOLEY,

having been previously sworn, testified further as follows:

Redirect Examination

Q. (By Mr. Guimont): Mrs. Dooley, showing you Plaintiffs' Exhibit 4, what is that representative of? Is that the area immediately adjacent——

The Court: Try to avoid leading questions.

Q. (By Mr. Guimont): What is that?

A. That is the area just surrounding their apartment. That is their apartment, the corner window, was their apartment.

Q. In the far background, there is a telephone pole down there, is there? A. Yes.

Q. Where is that with reference to where Mrs. Dooley is supposed to have fallen?

A. I didn't see Mrs. Dooley fall, but it is my understanding it happened right at that place where the wire was.

Mr. Guimont: I believe that is all.

Mr. Bateman: Are you offering that, Counsel?

Mr. Guimont: Yes.

Mr. Bateman: The defendants will object to the offered Exhibit No. 4 for the reason that it does not show actually the area involved in this case, but an area somewhat distant from there.

Also, there are figures in the foreground that are not identified, and there is a wire fence stake in the picture.

(Testimony of Mrs. Dorothy Dooley.)

It is not shown when that was up. It is not shown that it has any materiality to this case.

The Court: Is it one of your objections that the plaintiffs' Exhibit 4 does not purport to show the conditions as it was on the day of the accident?

Mr. Bateman: On the day of the accident, or at the place of the accident, Your Honor. The particular place involved in this case is so remote in that picture that it cannot be distinguished, and in the foreground there appear other objects which are immaterial and I believe improper to be admitted in this case. [72]

The Court: It has not been established as to when it was taken. That is of interest to the Court.

Q. (By Mr. Guimont): Mrs. Dooley, when did you take the picture?

A. If you would show me the other half of these pictures, it was taken at the same time. Mrs. Dooley was in a cast, and it was about two weeks after her accident, and the other three pictures that belonged on the film show her in the cast and show the children on the same lawn.

Q. The picture does show the way in which the wires were attached to stakes? A. Yes.

Q. And that was the same general means by which they were attached down here to the telephone pole that is in the far background?

A. Yes.

The Court: What is the purpose of the offer, and what kind of information do you contend it proves?

(Testimony of Mrs. Dorothy Dooley.)

Mr. Guimont: Just to indicate the faulty means by which the barricade was erected.

The Court: The objection is sustained.

Mr. Guimont: That will be all, Mrs. Dooley. [73]

The Court: Do you wish to cross-examine this witness, Mr. Bateman?

Mr. Bateman: No further questions.

The Court: You may step down.

(Witness excused)

The Court: At this time, we will take the noon recess, until two o'clock.

Mr. Guimont: May the record show that we are offering that exhibit in evidence?

The Court: The objection is sustained.

(Plaintiffs' Exhibit 4 rejected.)

(At 12:00 o'clock noon, Wednesday, March 10, 1954, proceedings recessed until 2:00 o'clock p.m., Wednesday, March 10, 1954.)

Seattle, Washington, March 10, 1954,
2:00 o'clock p.m.

The Court: You may proceed with the case on trial.

Mr. Guimont: May I have this marked?

(Scale drawing marked Plaintiffs' Exhibit No. 5 for identification.)

Mr. Guimont: I will call Mrs. Hart.

YVONNE HART

upon being called as a witness for and on behalf of the plaintiffs, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Guimont): Will you state your name, please?

A. Mrs. William L. Hart.

The Court: How do you spell your last name?

The Witness: H-a-r-t (spelling).

Q. (By Mr. Guimont): What is your given name? A. Yvonne.

Q. And where do you live, Mrs. Hart?

A. 1211½ North 44th Street. [75]

Q. In what city? A. Seattle.

Q. And, Mrs. Hart, are you acquainted with Mrs. Dooley?

A. Yes. I have known the Dooleys for six years.

Q. And did you have occasion to visit the Dooleys in November of 1952 or shortly before then? A. Yes, I did.

Q. Do you recall an occasion when Mrs. Dooley was injured? A. Yes.

Q. How soon before that did you visit them?

A. One week previous.

Q. And when you visited them, how did you get there? A. My husband brought me.

Q. In what kind of a conveyance? A. A car.

Q. In the family car? A. Yes.

Q. Referring to this Exhibit No. 5, would you point out and mark with a red pencil, if there is

(Testimony of Yvonne Hart.)

one available, the point and location where you parked your car? [76]

(Witness drew on Exhibit No. 5.)

Mr. Bateman: May I ask, has the Court been advised as to what this Exhibit 5 is?

Mr. Guimont: I will advise the Court.

The Court: If Counsel are agreed on that, I will be glad to have you do that.

Mr. Guimont: It is a map of the entire project area, Your Honor, that is involved in this litigation, and the area owned by the United States Housing Administrator and managed by Carroll, Hedlund & Associates.

The Court: By whom, and for what purpose was it made?

Mr. Guimont: It was made by the defendants.

Mr. Bateman: If I may explain that, your Honor. Not long ago, a complete topographical drawing of the entire area was made at the request of the Federal Housing Authority by the American Engineering Company of Seattle, and as results of their survey and field notes, this drawing or the original of this print was prepared.

The Court: By whom?

Mr. Bateman: By the American Engineering Company.

The name of the engineer just now escapes [77] me, but it has been stipulated.

The Court: Is that a local concern?

Mr. Bateman: Yes, it is, Your Honor. I believe it appears on the drawing, Your Honor. It says on

(Testimony of Yvonne Hart.)

the drawing, American Engineering Co., 322 Columbia Street, Civil Engineers & Land Surveyors. Arthur Hanson, I believe, is the engineer who prepared it.

The Court: And what do you call it?

Mr. Bateman: Exhibit No. 5 is a topographical drawing of the area as it exists and the property within the area on the drawing designated by the property line is the site of the Lake Burien Apartment Project.

Mr. Guimont: That is true.

The Court: Very well; you may proceed and inquire of the witness.

Q. (By Mr. Guimont): Now, will you mark on the map the location where you parked your car on the occasion of that visit?

The Court: Do you wish to advise her how to mark?

Q. (By Mr. Guimont): Will you mark it with a red pencil with a [78] little rectangle?

(Witness draws on Exhibit No. 5.)

Q. Now, after you parked your automobile, where did you go?

A. Right into the court.

Q. And when was that with reference to November 5, 1952? A. A week before.

Q. And which direction did you take to go into the Dooleys' apartment?

A. We got out of the car on the right-hand side, and walked right into the court past the telephone pole.

(Testimony of Yvonne Hart.)

Q. Will you mark with the blue pencil a cross on the point where that telephone pole is that you speak of?

A. What kind of a mark shall I make?

Q. Just a little cross to mark that pole.

(Witness marks Exhibit No. 5.)

Q. And did you pass the telephone pole on the walk? A. Yes.

Q. Now, did you observe anything about the barriers or barricades that were present at that point?

A. Yes. There was a little fence about this high (indicating) with stakes and wires in between. They were laying over on the sidewalk.

Q. And did you have anybody besides your husband with you?

A. Yes. I had my two children. I had the little girl with me, and my husband had the little boy, and we both turned around to them and told them to be careful of the wires because they were on the sidewalk.

Mr. Bateman: Move the answer be stricken.

The Court: The answer will be stricken. The reason for that is you cannot appropriately speak of conversations had in the absence of the plaintiffs or defendants or either one of them.

Q. Just with reference to the sidewalk, just where was this wire?

A. Over on the sidewalk, almost in the middle of it.

Q. And did you do anything about that?

A. No, I did not.

(Testimony of Yvonne Hart.)

Q. Did you move them? A. No, I did not.

Q. What time of day were you there?

A. It was around one or two in the afternoon.

Q. And did you observe them when you left the
[80] Dooley's residence? A. No, I did not.

Q. Did you go back out the same way?

A. Yes, we did.

Q. And you don't recall observing them at that time?

A. No, I didn't pay any attention to them then.

Q. Did you see Jean Dooley at that time?

A. That day?

Q. Yes. A. Yes, I did.

Q. Was there anything wrong with her leg or her appearance? A. Oh, not that day.

Q. Have you seen her since?

A. Yes, I have.

Q. And how soon after her accident did you see her?

A. Oh, I would say about three months, two or three months.

Q. And did you observe anything about her then?

A. Well, she couldn't walk too well. Her left leg was stiff. She had to limp.

Q. And have you observed her from time to time since then? [81] A. Yes.

Q. About how often?

A. Well, I have been out there about twice since three months after the accident.

Q. And on those occasions of your visit, did

(Testimony of Yvonne Hart.)

you pay any attention to or notice anything about Jean?

A. Well, no, except that she didn't walk as good as she used to.

Q. What seemed to be her difficulty, if any?

A. Well, she limped a little bit.

Mr. Guimont: I believe that is all.

Cross Examination

Q. (By Mr. Bateman): Can you fix the date or very close to the date when you first saw Mrs. Dooley after this accident, Mrs. Hart?

A. No. I can't tell you the date. It was just between two or three months.

Q. Was it before Christmas of 1952?

A. No.

Q. Was it after Christmas?

A. It was after Christmas.

Q. Was it after January 1, 1953?

A. Somewhere in there.

Q. Around January 1, 1953? [82]

A. Yes.

Q. And where was it you saw her at that time?

A. In her apartment.

Q. You came especially to visit her, did you?

A. Yes.

Q. She had her two children with her then?

A. Yes.

Q. Was there anyone else staying with her then? A. No.

Q. Was she in a cast? A. No.

(Testimony of Yvonne Hart.)

Q. Was she on crutches? A. No.

Q. This occasion that you went to visit her before her accident which occurred on November 5, 1952 was approximately one week before that?

A. Right.

Q. Then it was sometime before the end of October?

A. Well, it was the Sunday before the 5th of November, not quite a week.

Q. Was that the day after Hallowe'en?

A. I can't remember the date.

Mr. Bateman: No further questions.

Mr. Guimont: That is all. [83]

The Court: What about the exhibit? Do you have anything to say about that?

Mr. Guimont: I believe we stipulated that that could be admitted.

The Court: I didn't hear any offer.

Mr. Guimont: Well, we are offering that exhibit and offer it in evidence at this time.

Mr. Bateman: Before the witness leaves the stand, I wonder if I may see the exhibit?

The Court: You may. The Court postpones the ruling for the time being.

(Plaintiffs' Exhibit No. 5 handed to Mr. Bateman.)

The Court: Did you hear what Counsel says, Mr. Bateman?

The occasion calls for response from you. He is offering this exhibit.

Mr. Bateman: We have no objection.

(Testimony of Yvonne Hart.)

The Court: It is admitted.

(Plaintiffs' Exhibit No. 5 received in evidence.)

Mr. Guimont: That will be all, Mrs. Hart.

The Court: You may step down.

Mr. Guimont: May Mrs. Hart be excused?

Mr. Bateman: Yes. [84]

The Court: Mrs. Hart is excused, and she may retire when she wishes.

(Witness excused.)

Mr. Guimont: Mr. Dooley.

RICHARD E. DOOLEY

upon being called as a witness for and in his own behalf, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Guimont): Will you state your name? A. Richard E. Dooley.

Q. Are you hard of hearing, Mr. Dooley?

A. Yes, I am hard of hearing. I meant to bring that point out.

The Court: Is it difficult for him to hear anything and for you to make yourself heard to him?

Mr. Guimont: Occasionally, yes.

The Court: Would you take the arrangement that we made before?

(At this time, Mr. Dooley was placed in a seat directly in front of the Counsel table.)

Q. (By Mr. Guimont): Your name, please? [85]

A. Richard E. Dooley.

(Testimony of Richard E. Dooley.)

Q. Where do you live?

A. 1206 Southwest 137, Apartment 102, at present.

Mr. Bateman: I am sorry, but I did not get the street address.

The Witness: 1206 Southwest 137, Apartment 102.

Q. And are you married to Jean Dooley?

A. Yes, I am.

Q. Now, what is your occupation?

A. I am a structural ironworker.

Q. And, Mr. Dooley, on November 5, 1952, where were you living?

A. At 13710 12th Avenue Southwest, Apartment 101.

Q. And was that a housing project?

A. Yes, it is.

Q. And how long have you lived there?

A. At that time, I had lived there six months, approximately.

Q. And who did you rent from?

A. From the United States Government.

Q. Well, who managed it?

A. Carroll, Hedlund & Associates.

Q. And is there a rental office on the project?

A. Yes, there is.

Q. Did you pay your rent there?

A. Yes, I did.

Q. How much was your rent that time?

A. I believe my rent at that time was \$69.50, I believe.

(Testimony of Richard E. Dooley.)

Q. And had you been home all the time from the time you rented until November of 1952?

A. No, I hadn't been home all the time. Directly after moving into the project, I went to Alaska.

Q. And when did you return from Alaska?

A. September 26th or 23, I am not sure.

Q. Of what year?

A. That would have been 1952.

Q. Now, when you returned, what was the condition of the yard area around your home, right in the immediate vicinity of your apartment house?

A. Well, when I left, there wasn't any lawn in, and when I returned, they had apparently put in a new lawn, and had a wire fence, one wire strung around a new lawn.

Q. Did you observe the condition of that barricade after you returned and up until November of 1952? [87]

Mr. Bateman: May I interrupt? Counsel, which barricade are you referring to?

Mr. Guimont: To the barricade immediately surrounding the ground on which his apartment rested.

Mr. Bateman: Well, is this the one that you are contending Mrs. Dooley fell over?

Mr. Guimont: No. I believe that is across the sidewalk from it.

Mr. Bateman: I object to the question.

The Court: The objection is overruled. I understand it is preliminary.

(Testimony of Richard E. Dooley.)

Q. What did you observe about the barricade that was around the lawn area on which your apartment house was situated?

A. Well, apparently they had put one wire strand to keep the children off the lawn, apparently, but at times inadvertently, children would knock it over with tricycles, and at times—I can recall a few times that stakes had been pulled out or knocked out.

Generally speaking, I don't think much of the one-wire situation. Of course, I am a structural ironworker.

Q. Was there anything across the sidewalk from the plot of ground on which your apartment was located in the way of a barricade? [88]

A. Well, across the sidewalk from where my apartment is located, I don't think there was anything on that section of lawn, because that had been in a considerable period of time, I believe.

Mr. Guimont: Would you show the witness Exhibit No. 5?

(Plaintiffs' Exhibit No. 5 handed to the witness.)

Q. Referring to Exhibit 5, do you know the area in which your wife is supposed to have fallen down? A. Yes, I do.

Q. And would you mark that with red pencil, the area where you were informed that she fell?

A. A cross?

Q. Just a small cross, in red.

(Witness marks on Plaintiffs' Exhibit No. 5.)

(Testimony of Richard E. Dooley.)

Q. (By Mr. Guimont): With reference to that sidewalk, would you be able to tell us what barricade, if any, was alongside of the sidewalk on the edge furthest from your apartment house?

A. Well, this edge here?

Q. Well, referring, if you will, to the point you have marked with the cross, and alongside the telephone pole, was there any barricade there? [89]

A. Yes, there was.

Q. And did you have occasion to observe it from time to time, prior to November 5, 1952?

A. I had occasion to observe it, prior to November 5, 1952, at times. It wasn't in very good condition.

Q. Just what did you see about it, or what did you observe about it?

A. Well, sometimes a stake would be out or missing, and of course, the wire would be laying in different directions, due to that. There had been several times—I didn't make it a specific point to notice at any given date—but there were times when the wire was laying on the sidewalk, or a stick had been pulled up or knocked over. Generally, I wouldn't say it was in very good condition, in my opinion.

Q. Now, did you observe any workers on the project prior to November 5, 1952?

A. Oh, yes. There are workers on the project. Yes, there are.

Q. What did those workers do that you saw

(Testimony of Richard E. Dooley.)

them doing after September, when you returned from Alaska?

A. Well, generally, taking care of the property.

Q. Did they have anything to do with the lawns? [90]

A. Yes, they did.

Q. What did you see workers doing on the lawns?

A. Watering them at times, cultivating them, you might say.

Q. Trimming, possibly, hedges?

A. I believe I saw that done. Just general maintenance in the way of gardening, I believe you would call it, or landscaping.

Q. Did you observe them at any time doing anything to these wires that were on the property?

A. Several times I have seen them straightening out wires or putting back a stake.

Q. Did you ever see anyone knock down any of those wires?

A. Did I ever see anyone knock down the wires?

Q. Yes.

A. No, I can't say that I distinctly ever saw anyone knock down the wires. However, I have seen wires down and surmised that it came from a tricycle or bicycle or some vehicle, some young children's toy like that.

Q. Are there many children in the area?

A. Considerably, yes, there are considerable children in the area.

(Testimony of Richard E. Dooley.)

Q. Now, prior to November 5, 1952, what was [91] the condition of your wife's health so far as you know?

A. Well, seemingly in reasonably good health prior to November 5.

Q. Did she ever have any trouble with her limbs?

A. No. She has never had any trouble that way.

Q. Were you home the night that she fell?

A. Yes, I was. I was home the night she fell.

Q. What were you doing just before she fell?

A. I was working night shift. At the time, I was sleeping.

Q. And what at first happened to call your attention to your wife's trouble?

A. The neighbor lady came in and awakened me and told me of my wife's plight, and, of course, I hurried to the scene.

Q. Who called you?

A. Mr. and Mrs. Skewes are the occupants of the apartment that aroused me.

Q. Are they here now?

A. I don't know exactly their address, but they are in town, yes, they are.

Q. What did you do when you were contacted by them? [92]

A. Immediately I went to the scene where my wife was and tried to help her into the apartment.

Q. Where was she when you first went there?

A. My wife was outside my neighbor lady's window, her kitchen window.

(Testimony of Richard E. Dooley.)

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Q. Where was she when you first went there?

A. My wife was outside my neighbor lady's window, her kitchen window.

(Testimony of Richard E. Dooley.)

Q. Now, with reference to Exhibit 5, will you point out by a blue cross the location of your wife at that particular time and mark it "W"?

A. Where I picked my wife up?

Q. Yes.

A. Approximately about there, I would say (drawing on Exhibit 5.)

Q. You have marked that just "W"?

A. "W".

Q. Will you also mark a little small cross there alongside of a "W" to represent your wife's body?

A. You said "cross", I believe, didn't you? (Marks Plaintiffs' Exhibit 5.)

Q. Yes. Now, what did you do when you found your wife?

A. Well, my main concern was to get her inside the house and call a Doctor, and that is what I did. I had to take her to my apartment via some steps to get her in the apartment. It is very, very hard to take [93] a woman like that in an apartment when she has a broken leg and pregnant at the same time. With the assistance of the neighbor lady, we both got her in there.

Q. What did you see or observe about your wife's condition at that time when you picked her up?

A. Well, I saw she had had an injury, and obviously she couldn't talk when I picked her up. Obviously she couldn't. She was laying there.

Q. What were the conditions of her clothes?

A. Actually, I can't say that I can answer that,

(Testimony of Richard E. Dooley.)

because I was primarily concerned with her knee. That is the only way I could answer that.

Q. Now, did you take her into the adjoining apartment?

A. With the help of the neighbor lady, we took her arms and assisted her into the apartment.

Q. Was she able to walk?

A. No, she wasn't able to walk.

Q. Thereafter, what did you do?

A. After I had her in the house and on the daveno and inspected her leg, and from previous experience with lots of industrial accidents, I knew it was serious, so first thing in my mind was to get her something so that she could endure the pain. I could see it was extremely painful, so I tried to call one Doctor. [94] He was out—I believe on his way home. Went across the street to an osteopathic physician which resided right across the street at that time. He wasn't in. I went to a neighbor lady and had her tell me the name of her Doctor in West Seattle, and tried to call him. It was at a very inopportune time for Doctors. It was at the commuting time, as I understand it. I called my family obstetrician, the Doctor that takes care of my wife, delivers the babies, and had him advise me what to do.

Q. And then what did you do?

A. Took her into the Maynard Hospital in my car.

Q. How did you get her into your car?

A. With the assistance of a neighbor that lives

(Testimony of Richard E. Dooley.)

upstairs, a neighbor man. We got her into the car, which took a little maneuvering.

Q. Now, did you leave your wife at the hospital that night, then? A. Yes, I did.

Q. And how long was she in the hospital as you recall?

A. Eight or nine days. I am not sure. Eight or nine days.

Q. Now, did you see her in the hospital during [95] that time? A. Yes, I did.

Q. What was her general condition from the evening that you took her up there until she was returned to home?

A. Well, she was very overwrought all the time she was in the hospital, in quite severe pain, the first couple days before the swelling went down and he could operate on the knee, very severe pain.

After he operated on the knee, why, that seemed to remedy that a little bit, the pain, that is, after the swelling had gone down just enough so that he could begin the operation.

Q. Now, when she came home, what was her condition?

A. Well, she came home with a cast on her leg and suffered quite a bit mentally, and considerable suffering she had physically from the leg. She had to take tablets at times to sleep at night, and generally speaking, it was the combination of mental and physical factors involved there.

Q. How did she behave towards you and the family?

(Testimony of Richard E. Dooley.)

A. She was very upset and overwrought, and under the circumstances, why, I could appreciate that, [96] but she was in very, very bad nervous state.

Q. How long did that persist?

A. Well, actually, I don't think it has cleared up yet.

Q. She seemed different to you ever since the accident?

A. Yes, quite a bit.

Q. Now, did you have any help in the home immediately after this accident?

A. My mother came out and helped with the household chores and watched the children while my wife was in the hospital and for approximately five or six weeks thereafter. She commuted the last couple of weeks, I believe, while I was working. I had to have someone there with the children.

Q. Now, with reference to the area where you have been informed the fall took place, what is the lighting facility there, if any?

A. They have a light on the adjoining apartment house. I don't think it is quite adequate to cover the sidewalk where the accident occurred.

Specifically, I believe the light was put up to aid one in getting out of cars in that parking area involved there.

Q. With reference to that particular area where [97] you are informed the fall occurred, what is the condition of the lighting on the sidewalk?

A. Well, under the conditions at nighttime, I

(Testimony of Richard E. Dooley.)

don't think you could see that wire with the lighting facilities available. I don't think you could see the wire at nighttime.

Mr. Guimont: I believe that will be all.

Cross Examination

Q. (By Mr. Bateman): Mr. Dooley, with regard to the lights available there, there is this area light from the adjoining apartment house, is there not? A. Yes. That is true.

Q. And in addition to that, there is a light at the end of that little parking street, is there not, on a regular street light pole there?

A. If I am in error there, I would have to be corrected. The only light I know of is actually the light on the apartment house. There may be another one.

Q. You don't know whether or not there is another light there then at the end of that little drive-in street to that parking area?

A. At the end of the parking area, there might possibly be a light, yes, that is true. [98]

Q. And do you know whether or not the store or market area just immediately adjoining that portion of the project had floodlights up on high light poles lighting up the market area?

A. Yes, that is true. They have floodlights. I have noticed them at times.

Q. And, Mr. Dooley, have you had occasion to observe in the evening or at night how those floodlights shine on the surface of the building along

(Testimony of Richard E. Dooley.)

which this particular walk runs and illuminate the sidewalk?

A. I have never distinctly noticed that. However, the floodlights could in said condition not completely illuminate the sidewalk in view of the fact that you have cars parked between the floodlights.

Q. Have you ever measured the amount of light on the surface of that walk at the point where you have indicated on this exhibit that you are informed this accident occurred, the amount of artificial illumination after complete darkness on the surface of that walk?

A. Well, to measure—what are we using to measure with? May I ask that, please?

Q. Well, have you measured it in any way with anything?

A. Well, the only thing you could—it looks to me like—it would be with your eye. [99]

Q. Then I take it you have not measured it except by going out there to look?

A. That is true.

Q. And have you ever been out there to look at night to see how much illumination there is on that walk?

A. Well, since the accident, I can see how she could—

Q. Well, can you answer my question? Have you ever been out there at night to look and observe and see, form an opinion, as to how much light there is from that walk?

(Testimony of Richard E. Dooley.)

A. Well, yes, I have.

Q. And you can't recall whether or not there is a street light on the telephone or light pole right at the end of that little driveway some 100 feet away?

A. Well, a light a hundred feet away wouldn't affect the walk.

Q. You can't remember whether or not there is even any light there even though you have been out there to observe the condition of the light?

A. No. I cannot tell you the condition of a light a hundred feet away, because that wasn't involved with the area where the accident occurred.

Q. Well, in going out there to measure, did you [100] take any notice or observe what the condition of the light is on that walk at night? Did you observe what effect, if any, those floodlights from the market area have on the sidewalk there as far as illumination is concerned?

A. As far as illumination is concerned, floodlights could light the sidewalk, but they wouldn't light the wire.

Q. What is the situation as far as those floodlights are concerned, if you have been out there to observe it?

A. Well, actually, I can't answer that. I don't know that I can.

Q. Well, do you know whether or not those floodlights have any effect on the amount of illumination on that sidewalk?

A. I do not.

(Testimony of Richard E. Dooley.)

Q. Did you go to Alaska during the summer of 1953, this summer just past?

A. I did, yes.

Q. When did you leave to go to Alaska the first time?

A. July 2, I believe, of this past summer.

Q. And when did you return?

A. About July 15 or 16. [101]

Q. You were just up there for two weeks, then?

A. A very short time, yes, I was.

Q. And you haven't been back there since?

A. Yes, I have.

Q. When were you back again?

A. I went back approximately August—I couldn't give you the exact date. These things happen so often.

Q. You were up there in August, then, for how long?

A. Just about a month.

Q. And returned in September again, did you?

A. I believe it was September.

Q. During that time, your wife was alone at the apartment?

A. Yes, she was.

Q. By the way, you are still residents at the Lake Burien Apartment House Project, aren't you?

A. Yes, we are.

Q. You now live in a different apartment there?

A. Yes.

Q. It is a larger apartment?

A. Yes, it is.

Q. And you moved into that new one when

(Testimony of Richard E. Dooley.)

your [102] wife returned from the hospital with this new baby, or shortly thereafter?

A. Yes.

Q. My question, Mr. Dooley, was you moved into a new apartment shortly after your new baby was born in June or July of 1953, is that correct?

A. No, that isn't correct.

Q. When did you move from the apartment in which you were living on November 5, 1952?

A. I can't give you the exact date. However, associated with the birth of the baby, we moved there I am sure before we had the new baby.

Q. Shortly before, was it?

A. I believe so.

Q. And when was your baby born?

A. June 14, 1953.

Q. And that was very close to the date the birth of the child was expected, was it not?

A. Oh, absolutely.

Q. And between the time of your wife's accident on November 5, 1952 and the birth of the baby on June 14, 1953, you were living home with your wife, were you, all that time?

A. Yes, I was.

Q. And she was caring for these two other [103] children you have, one about nine months old and one two years old, as well as carrying this unborn child?

A. Yes, that is true.

Q. She had no help during that time except on occasions when your mother was there, is that correct?

A. And from myself.

(Testimony of Richard E. Dooley.)

Q. And your help?

A. Yes, changed lots of diapers.

Q. I'll bet you have.

By the way, did she take care of the diapers, et cetera, during that time, except for the assistance that she received from you?

A. I have aided her. That is true.

Q. Did these other two youngsters nine months old and approximately two years old ever get on her nerves during that time?

A. We are referring to after the fall?

Q. Yes.

A. I think everything does now.

Q. Well, now, isn't it true that before the fall, also, that she was a pretty busy lady, and sometimes these two young children, so close together in age, and so young, often got on her nerves before this accident? [104]

A. Well, yes. Children have a way of doing that.

Q. She would be a pretty unusual mother if there weren't times when the little ones got on her nerves, wouldn't she?

A. That is true, although she is a very gentle mother with my children.

Q. I am sure of that.

Were you working all the time, that is, regularly, between September, about the time you returned from Alaska in 1953, until the date of this accident? A. No, I wasn't.

(Testimony of Richard E. Dooley.)

Q. You were not? Working just occasional jobs, is that correct?

A. Well, I had been to Alaska on a three and a half months, seven days a week, fourteen hours a day job. I took a little time off when I returned, and then went back to work.

Q. How long were you off work, do you recall?

A. Just about November 3 or 2, let's say, just had obtained that job before she fell.

Q. Just before this accident? A. Yes.

Q. You testified, I believe, that you saw the [105] Project crew or grounds crew working around the grounds of the apartment house in that area from day to day? A. That is true.

Q. Do you know how many men they had from the grounds crew in the apartment project?

A. No, I haven't any idea.

Q. You saw them from time to time repairing the fences? A. That is true.

Q. On Plaintiffs' Exhibit 5, you have placed the blue "W" and a sort of a star—cross—mark where you say you saw your wife first after this accident? A. That is right.

Q. And in your opinion, approximately how far was that from the place where you were informed she fell?

A. Approximately 45 feet offhand.

Q. Had she had any assistance to get that far?

A. None whatsoever.

Q. She was not unconscious then when you came to her?

(Testimony of Richard E. Dooley.)

A. I would say semi-conscious.

Q. Was she crying?

A. Tears on her face, and extreme pain.

Q. Well, now, was she crying? [106]

A. Yes, she was.

Q. Did she talk to you?

A. She did incoherently.

Q. Who assisted you in getting her into the building? A. My immediate neighbor lady.

Q. What was her name? A. Mrs. Skewes.

Q. And did you do that by placing one of your wife's arms over your shoulder and the neighbor lady assisting on the other side in a similar manner? A. Yes, but it was very awkward.

Q. So your wife supported her weight more or less on the right leg—the uninjured leg—and moved along in that fashion?

A. With like support on her uninjured leg, yes.

Q. Now, was this neighbor lady, the same Mrs. Skewes, whose window she was outside of at the time you came to her?

A. Was that the same neighbor lady was assisted me?

Q. Yes. A. Yes, that is true.

Mr. Bateman: No further questions.

Mr. Guimont: I have no further questions. [107]

The Court: He may be excused from the stand, unless counsel wish to ask further questions.

(Witness excused.)

Mr. Guimont: Will you mark this?

(Bills marked Plaintiffs' Exhibit No. 6 for identification.)

Mr. Bateman: We have no objections to No. 6.

Mr. Guimont: It may be stipulated that these are the bills for medicine and the Maynard Hospital and the therapist, Mrs. Myers, that the charges are reasonable?

Mr. Bateman: Yes, we will so stipulate.

Mr. Guimont: We will offer No. 6, your Honor, in evidence, as part of the bills.

The Court: It is now received in evidence.

(Plaintiffs' Exhibit No. 6 received in evidence.)

Mr. Guimont: Mrs. Dooley, please.

JEAN DOOLEY

upon being called as a witness for and on her own behalf, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Guimont): Will you state your name, please? [108] A. Jean Dooley.

Q. And you are the wife of Richard E. Dooley?

A. That is right.

Q. And how old are you, Jean? A. 27.

Q. And what is your birthday?

A. April 17.

Q. What year? A. '26.

Q. 1926? A. Yes.

Q. And how many children do you have, Jean?

A. Three.

Q. And their ages now?

(Testimony of Jean Dooley.)

A. Nine months, two and three.

Q. Now, where do you reside now?

A. 1206.

Q. And where did you reside on November 5, 1952?

A. At 13710 12th Avenue Southwest, Apartment 101.

Mr. Bateman: May I interrupt? I did not get the witness' present address.

The Court: Will you give that address?

The Witness: 1206 Southwest 137th Street, [109] Apartment 102.

Q. (By Mr. Guimont): Mrs. Dooley, what is the name of the place you were living in?

A. Lake Burien Heights Apartments.

Q. And with reference to the city limits of Seattle, is it south?

A. It is south, zone 66.

Q. When did you first move there?

A. June, I think, June of '52, I believe.

Q. And you rented it from——

A. Carroll, Hedlund & Associates.

Q. And do they have an office on the project grounds? A. Yes, they have.

Q. Do you recall what your rent was at that time?

A. \$69.50. And then we had a raise and it became \$74.50.

Q. Now, did you see the grounds immediately surrounding your own apartment from time to time? A. Yes, every day.

(Testimony of Jean Dooley.)

Q. What was the condition at the time in November of 1952 of the lawn area or the area around the apartment? [110]

A. Well, by the month of November, this lawn had become quite substantial, and we had had permission from the office—Mrs. Rebar called to get permission to be on the lawn, but the fence remained in one spot in front of my house.

Mr. Bateman: I would like to object to this witness' testimony concerning the conversation Mrs. Rebar may have had with anyone, and I move to strike it.

The Court: You cannot tell what anybody said.

Mr. Bateman: I move to strike that testimony.

The Court: You may say what they did, but do not speak the words.

Q. (By Mr. Guimont): Just what was the condition then of the barricades around the lawn area?

A. Well, around my front entrance, there were no wires whatsoever. The stakes had been uprooted and destroyed by the children, and the wires were somewhere where they shouldn't have been. They weren't there any more, but on the other side of my building, toward the corner, the wires were up, and in spots the wire might be broken and coiled around, looped in the air, up against the house, or most anywhere, and some of the stakes were uprooted. Some were broken and some were missing. The neighbors and myself always threw the wires aside [111] out of the path any time we

(Testimony of Jean Dooley.)

saw such a situation. They had been maintained for awhile up until the painters painted the place and they tore down part of the wires with their ladders, and I guess they gave it up then, and there was no more maintenance, but up until then, I saw the men working on the wires, keeping them in condition.

This was about four weeks before the accident.

Q. And then, up until that time, did you observe them caring for the barricades?

A. I would like to retract that four weeks. After thinking it over, I am quite sure it must have been longer, because I do know that the repair stopped—I am hooking this up with a certain date in my mind—I would say it was the latter part of September that there was no more maintenance.

Q. Were the buildings being painted up until then, do you say?

A. I am quite sure it was sometime in September they were painted, and that is when the wires were at their worst, and remained so.

Q. Now, up to that time, who did look after the wires?

A. Well, I had seen some fellow come around every few days with pliers and a little cart with some [112] extra wire and stakes, and every few days I would see him putting them back like they should be, but they were torn down about as fast as he could repair them.

The Clerk: This is Plaintiff's Exhibit No. 7.

(Testimony of Jean Dooley.)

(Photograph marked Plaintiffs' Exhibit No. 7 for identification.)

The Court: Before you were married, where did you reside?

A. Well, I lived in Alabama.

The Court: You were not reared in Alabama, were you?

The Witness: Yes.

The Court: And your husband, where did he grow up?

The Witness: Seattle.

The Court: Do you or your husband ever do any public speaking or any activities in the way of public service?

The Witness: No.

The Court: Just private occupational activity?

The Witness: Well, I have worked with the public.

The Court: What kind of public work? [113]

The Witness: Waitress; waitress.

The Court: Do you ever do any other kind of public work, like taking a leading part in any organization you belong to, church, union, society or group?

The Witness: No. I was once president of B.Y.P.U. when I was much younger.

The Court: Did your husband ever, to your knowledge, take any leadership among young people or others?

The Witness: Nothing other than we always

(Testimony of Jean Dooley.)

buy what the Girl Scouts are selling and Boy Scouts.

The Court: I meant in the way of solicitation or advocating to others any products or causes or anything of that sort?

The Witness: No.

Q. (By Mr. Guimont): Mrs. Dooley, showing you, referring to Exhibit No. 7, what is that the scene of?

A. Well, this is the spot where I fell as I turned the corner.

Q. That is a picture——

A. Of the sidewalk and the spot where I fell.

Q. That picture is one that the defendants have taken? [114] A. Yes.

Q. It doesn't show any barricade?

A. No. The wires are removed in this particular picture. This is much later.

Q. Now, did you yourself take a picture after you returned from the hospital of the area?

A. Yes, I did.

Mr. Guimont: Will you mark it?

(Photograph marked Plaintiffs' Exhibit No. 8 for identification.)

Q. (By Mr. Guimont): And referring to Plaintiffs' 8, I will ask you if that is the picture you took? A. Yes, it is.

Q. And how soon after your accident did you take that?

A. Well, I was walking along—it must have been two weeks after I had returned—no, I did

(Testimony of Jean Dooley.)

have a cast on—no, I was out of my cast. I would say six weeks after the accident.

Q. Now, referring to the night of November 5, 1952, will you tell the Court just what occurred when you left your home, where you were going and what occurred?

A. Well, it was about ten or possibly fifteen minutes until six o'clock, and I was on my way to the [115] meat market, which is about three minutes' walk from there.

Mr. Bateman: I am sorry, Mrs. Dooley, but you speak very rapidly and not very loudly, and it is somewhat difficult to hear. I wonder if the reporter would read back this last answer?

The Court: The reporter will read back the answer as far as she has gone.

(Last answer read by the reporter.)

A. I left my children with Mrs. Skewes, a neighbor across the hall, two small children. There is a basement entrance in the building, right at my door, and I took that entrance and went to the basement through the basement, and up a short stairway there, and across a drying yard.

It is a cement walk, cement yard, and then I entered the sidewalk which leads around the side of the building and on to the main sidewalk and the spot where I fell.

Q. Now, at that time, what was the light? Was it daylight or what?

A. It was quite dark, and since then, about the light, I did make it a point to look and see where

(Testimony of Jean Dooley.)

the light was located. But at that time, I didn't look for a light, but I do know it was dark and——

Mr. Bateman: I move the witness' answer be stricken. It is not responsive to any question.

The Court: I think you should wait now until another question is asked.

Mr. Guimont: What was my last question?

(Last question read by the reporter as follows: "Now, at that time, what was the light? Was it daylight or what?")

Q. (By Mr. Guimont, continuing): Was the sun out?

A. No. It had gone down. It was quite dark.

Q. And do you recall any lighting fixtures that were on the ground?

A. At that time I didn't think of it, although later I noticed these things.

Q. Did you observe any lights over the area near the place where you fell?

A. Well, I only observed that it was quite dark at the spot where I fell.

Q. Now, were you in a hurry?

A. I was hurrying to the store.

Q. Now, what was your physical condition at that time?

A. Well, I have always been in excellent health. I was pregnant at this time, five or six weeks, and was [117] hurrying, not running, for that reason.

Q. Now, if you will refer to Exhibit No. 8, there is a telephone pole in that picture. What occurred when you drew up toward that pole?

(Testimony of Jean Dooley.)

A. Well, I felt myself being entangled in wire somewhere on the lower leg, and as to just how it was laying at that time, I really didn't see it, but I did realize I was going to fall—I felt it—but anyway, I stumbled forward several steps before I did fall, and came down with terrific impact on my knee, mostly, I suppose. I was trying to avoid falling flat, and, well, the pain then was so great in the next few minutes I am not sure just what happened. I know I tried to get to my seat and couldn't, and I considered pulling myself up on the telephone pole, but I couldn't get to it, and then there was a stake of wood laying near me which I hadn't seen before because it was so dark, and I tried to pull myself upright on it, and there was still a piece of wire attached to this wood.

I don't know whether I broke it or uprooted it or it was laying there or just what. I couldn't say about that, but I couldn't get to my seat, so I decided to wait a minute and see if someone would pass by, but all the shades were down and the lights were on in the places, and I figured most of them would be in the [118] kitchen, and so I proceeded to crawl, then, or, rather, to drag myself and retrace the steps I had come, and when I got to the drying yard—that is underneath my neighbor's kitchen window, and I had left her in the kitchen—I went to her for help. That was the closest spot.

Q. Did you yell or call to her?

A. I called to her. Her kitchen window was open, so she looked out, and I told her I hurt my

(Testimony of Jean Dooley.)

leg. I asked her to throw me a broom, which she did. I tried to raise upright on that, but I almost fainted or something, and laid down. So she came out and looked at my knee, and went and wakened my husband and she got me into the house.

Q. Do you recall what the appearance of your knee was right then when she looked at it?

A. It was terribly swollen, terribly, probably that big (indicating). By the time I got to the house, I would say my knee was about the size of a football or possibly more.

Q. Now, where were you when you felt this wire with reference to the sidewalk? Where were you when you felt the wire?

A. Well, I as turning the corner, and possibly shortly before I reached the corner—that I really can't be certain of. Either I was turning the corner, or was going to in the next step or two, but it was right on the corner there as you make a right turn.

Q. Referring to Exhibit No. 5, would you mark on that map with a small red "x", the position where you believe you were when you came in contact with the wire, and mark it "J" for "Jean"?

A. There is another "x" there. (Marking on Exhibit No. 5.)

Q. How did you get from that point to the point where you called to this other woman?

A. I crawled, or more or less pulled myself by my arms, and drug my body with my arms to her window.

(Testimony of Jean Dooley.)

Q. When you contacted this other neighbor, what occurred then?

A. Well, she came out, and my husband picked me up, as I recall, but I am not too clear about that. I think I was on his back, and she was more or less trying to steady my leg. In fact, she was sympathizing more than helping, but anyway, I think I was on my husband's back, hanging around his neck by my arms, and she assisted in trying to put a splint on my leg after we had got in the house, and we didn't do that. Oh, I don't remember it very clearly. I was in a lot of pain [120] and I was conscious, but I was hurting so bad I don't think I can remember that clearly enough to say.

Q. Well, did you go into your neighbor's apartment, or into your own apartment?

A. Into my apartment.

Q. And then what next happened?

A. Then my husband tried unsuccessfully to get a Doctor. He tried to get several Doctors, and then we were advised by my obstetrician just to go to the hospital, and he himself would notify Dr. Ruuska and have him there, and we arrived at the hospital—a neighbor man who lived upstairs assisted me to the car first—and we arrived at the hospital, and I was in great pain by then, and in fact, I was screaming with the pain and they gave me a shot of something—I don't know what—but it helped considerably, but it made me—I don't know—I can't remember so well after that, whatever it was.

I do remember, and I don't. Anyway, I am not

(Testimony of Jean Dooley.)

too clear there. The pain was still with me, but it wasn't as bad as it had been.

Q. Then do you recall talking to Dr. Ruuska when he got there?

A. I know when he came in, and I do know that he asked me what happened, and how did it happen. Actually, [121] I don't know if he was making conversation, or just what. Anyway, I answered him as briefly as possible, because I was in great pain, and each word was an effort to get out.

Q. Do you recall what you did say to him about what had happened?

A. Well, the best I remember, and I couldn't be just sure of the words I used, but it was very brief, just that he wanted to know why did I fall, and I said that I fell over a wire.

He said, "What kind of a wire?" And I said, "A wire for the purpose of keeping people off of the lawn." He said, "Like what?" And I said, "Like two stakes with a wire stretched between", or something to that effect, but I am not sure of the words I used.

Q. Now, do you recall the visibility at the point where you fell?

A. I recall there wasn't very much.

Q. Is that area lighted by lights at night?

A. There is a light about 75 or 100 feet from there, on a building, and there happened to be a wooden fence, a picket fence, probably eight feet high, and I think the fence is responsible for it, but anyway, that particular corner is obscured by some-

(Testimony of Jean Dooley.)

thing. I don't [122] know just what it would be, but I have passed there many months later at night and noticed this condition.

The whole corner there is quite dark.

Q. You have observed it since? A. Yes.

Q. Does the corner receive any light from the shopping area?

A. Well, actually, if it does, I didn't notice it at the time I was there, because this one time I inspected it deliberately for that reason to see how light the corner was, and it was quite dark, and I do know the light on the house was on, the street light which is on the house was on, and to my knowledge, that is the only light I saw unless the others were so far away that I didn't think they had anything to do with that thought.

Q. Well, do you know where the wire was when you fell?

A. Well, I know where I felt the wire, but I couldn't describe its position accurately.

Q. Well, with reference to your position on the sidewalk, and the sidewalk, where was the wire?

A. I do know that I was on the sidewalk. I was walking in the middle of the sidewalk, no doubt, and in the process of making a turn or about to, or already [123] had—I am not too clear there.

Q. Is that where you fell?

A. That is where I fell.

Q. Now, was that wire loose when you first felt it?

A. Oh, yes, it was definitely loose, because well,

(Testimony of Jean Dooley.)

after thinking it over afterwards, much later afterwards, it must have been a loose wire, because it was down around my ankles or slightly higher than that.

Q. Do you recall having observed that particular wire before this occasion?

A. Well, not that particular one. Mostly, the wires that I could see from my front room, I had observed those, but this particular spot, I hadn't, although I have been in that section, but I just didn't observe the wires.

Q. Was the sidewalk obstructed from time to time with wire?

A. I once saw it obstructed, and my neighbor, Mrs. Skewes,—it was from her window—and we called to her little boy who was outside to untie it. Some children had tied a loose end of wire just across the sidewalk.

Q. When was that with reference to this?

A. Well, it was sometime before, but I couldn't [124] be sure, several weeks before the accident.

Q. Did you observe any maintenance work being done around the area where you fell?

A. Yes, frequently. They had a man who trimmed shrubs, and another who mowed the grass, and another who watered it, and, oh, someone who hoed, and they had quite a few gardeners.

Q. Well, did they do anything to this barricade arrangement after this painting job was done?

A. No. If they did, I didn't see it, and I usually saw what was going on. I was outside a lot, and

(Testimony of Jean Dooley.)

have a very good view from all of my windows, but I didn't see him, if he ever came around, but from the looks of the wires, I would say that he never came around any more after then.

Q. Now, just what was your general condition in the hospital?

A. Well, when I arrived there, we had x-rays made, and I was told that it was broken.

I didn't know—in fact, my mind was a little—I just wasn't thinking about that. Well, anyway, that came to me as a shock when she told me I had to stay, because I had planned on coming back home. I thought—I didn't know—and then I mentioned the fact that I was pregnant, and he said [125] it was quite likely that I would lose the baby as soon as I had the operation.

Mr. Bateman: May it please the Court, I object to any testimony of the witness as hearsay.

The Court: The objection is sustained, and it is stricken.

Q. (By Mr. Guimont): Just what did you yourself observe or feel while you were in the hospital and how long were you there?

A. I was there either eight or nine days, and I had received shots several times daily every few hours. I don't know if it was the shots or my nerves, but anyway, everything in the hospital seems quite vague today, looking back on it. I was in great pain—I remember that—and I was under shock, and very worried about my children at home, and the one that I thought I would probably lose, and it de-

(Testimony of Jean Dooley.)

veloped that I didn't lose the baby, but it looked that way for quite some while.

Q. Now, then, did you return from the hospital after nine days or eight days?

A. Eight or nine days. I went home then.

Q. And when you got home, what did you do, or how did you get along? [126]

A. Well, I was in bed most of the time, or laying on the davenport in the daytime, but it was quite painful to move around. I usually stayed in the same spot for sometime, and as soon as I was able to get up and move around and get to the telephone—I think this was probably the second day after I had come home, the first or second—I called the office and reported the fact that I had broken my leg over the wires, and they had already heard about it. I talked to Mrs. Wilson. I am quite sure, and she called me back in a couple of hours and asked for the details. She said that she had to file an official accident return, so I told her the time of the day, and the spot where it occurred, and everything that she wanted to know, and when I mentioned where it had happened, she said: "Oh, I heard you fell down your steps." I said, "Well, where did you hear that?" And she said, "Well, I heard it."

So, just that. I wasn't near any steps.

Q. Now, when did you have the cast removed?

A. Four weeks thereafter, after my return.

Q. After you were home? A. Yes.

(Testimony of Jean Dooley.)

have a very good view from all of my windows, but I didn't see him, if he ever came around, but from the looks of the wires, I would say that he never came around any more after then.

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So, just that, I wasn't near any steps.

Q. Now, when did you have the cast removed?

A. Four weeks thereafter, after my return.

Q. After you were home? A. Yes.

(Testimony of Jean Dooley.)

Q. And during that period of time, did you have help at home? [127]

A. Yes, my mother-in-law was there, doing all of the work.

Q. Now, how did you respond after that? I mean, what was your general health and condition?

A. Well, the pain was quite unbearable at times, although I had medication for that condition, and, well, for many months, the pain was very bad. But immediately preceding,—I mean, immediately after this—in fact, I began to feel it in the hospital—I was very nervous, and I guess I developed claustrophobia, and anyway, it was pretty hard to live with myself for many months thereafter.

Q. Has that condition changed any?

A. The claustrophobia itself is gone completely now, I think, but it went away shortly after the birth of the baby, but in general, I am more nervous than I ever was before, but I am working on that.

Q. How does your leg respond now?

A. Well, I find it very awkward, all the time, and quite painful most of the time, and it is stiff. There is a chronic stiffness there, and I feel it more at some times, than at others, but anytime I am sitting, if I move it frequently, it helps, but anytime it is still—I wake up at night and have to move it a few [128] times, and it doesn't bend as far as the other one, and I find that inconvenient in house-keeping, and on picking up things from the floor and other things.

Q. What is the appearance of your leg now?

(Testimony of Jean Dooley.)

A. Well, to me, I don't like the appearance. I think it is an inch smaller than the other, and the thigh itself seems to be quite flabby, and I have taken treatments for that, trying to restore it, but I don't seem to be getting anywhere.

Q. Could you display the knee?

The Court: I don't believe that is necessary. If she wants to take a picture of it to let some other tribunal see it, I do not need that aid. I would rather have her describe it as exactly as she can in words, because then they are in the record, and others, who might have occasion to review the record, would know as much about what she said, or the method of her conveying the idea that she had as I would.

Mr. Guimont: Yes, your Honor.

Q. (By Mr. Guimont): Mrs. Dooley, what is the length of the scar?

A. Well, about five inches, with my leg straight, and when I bend it, the scar is longer. It is over six inches then.

Q. How wide is it? [129]

A. Oh, probably three-quarters of an inch in one spot, and it tapers down then to a half inch, and toward the end, it tapers into a point.

Q. What is the color?

A. It isn't discolored too much, just some purple discoloration, and it has sunken spots, and raised spots in it.

Q. From where does it extend?

A. Oh, below and above the knee.

(Testimony of Jean Dooley.)

Q. It crosses the entire knee, does it?

A. Vertically, yes.

The Court: At what date was the last day when you wore a cast on that place?

The Witness: Well, I would have to think a minute. Well, about five weeks after November 5. It was the early part of December in '52.

The Court: That the cast was finally removed?

The Witness: Yes.

The Court: Since that time, you have had no skin contact at that place with any hard substance like a cast or metal or wood, or anything of that sort?

A. No. As a matter of fact, I can't touch it. It is very touchy.

Q. (By Mr. Guimont): And how does it feel over the site at the present time?

A. Well, I frequently hurt it. To any pressure on it, such as in a kneeling position, that is impossible to do. It feels as if there is something sharp there, and frequently, I will just slightly catch it against the bottom of the sink, like when washing dishes, and that seems to bother it, too.

As long as I don't touch it—but any pressure from a hard surface, it hurts quite badly.

The Court: Is there any swelling now about the kneecap?

The Witness: Not now. There has been.

Q. (By Mr. Guimont): The swelling has seemingly been removed? A. Yes.

(Testimony of Jean Dooley.)

Q. When was the last observation you made of swelling, Mrs. Dooley?

A. Well, it has been close to a year ago now, but my legs have veins in them now. I mean, it is capillaries, bursted capillaries, from the swelling. They used to swell so big. Even though it doesn't swell any more, it has left the purple marks, and bruises, where it used to swell so big.

Q. Do you recall what the weather was that [131] night?

A. I recall that it wasn't raining, and if it was cloudy or not, I don't know. I had on a short coat. It couldn't have been too cold.

Mr. Guimont: I believe that will be all.

The Court: I think at this time we ought to take a recess. There will be a recess for about ten minutes.

(Recess.)

The Court: You may proceed.

Cross Examination

Q. (By Mr. Bateman): Mrs. Dooley, you and your husband have an apartment in the same Lake Burien Apartments at the present time, do you?

A. Yes, we have.

Q. That is a large apartment house project, isn't it? A. Quite large, I would say.

Q. And in a general way, it is now a very attractively landscaped project, the grounds and all?

A. I think so, yes.

(Testimony of Jean Dooley.)

Q. Was it that way when you first came there in June of 1952?

A. Well, there has been improvements since [132] then.

Q. There have been a great many improvements in landscaping the lawn areas and the like, have there not? A. Yes.

Q. There are a great many tenants who have children in the apartment project?

A. Yes, most of them do.

Q. You, yourself, have three now?

A. Yes.

Q. And many of your neighbors have two or more children? A. Yes.

Q. Is that why you moved into the apartment project because they took children?

A. Largely.

Q. It is difficult to find housing sometimes for people with young children, isn't it?

A. I have heard so, although this was the first place we had inquired about.

Q. Did you live in this particular apartment that you were living in on November 5, 1952, from the time you first moved into the project in June of '52?

A. I don't understand that.

Q. I say, in June of 1952, you moved into these [133] apartments? A. Yes.

Q. And did you occupy the same apartment from the time you first moved in until after this accident? A. Yes.

(Testimony of Jean Dooley.)

Q. And that apartment was in building—what was the number?

A. I think it was building 5. I am not sure about that.

Q. It has a street number, however, and you had an apartment number which designates the building?

A. Yes.

Q. Would you designate on Exhibit 5, if you will please, by placing your initials, "J.D." in the building designated on that drawing that you occupied in which your apartment was located?

(Witness writes on Plaintiffs' Exhibit 5.)

Q. You are marking your initials in red pencil, are you?

A. Yes, that is right.

Q. During the summer of 1952, and the fall of 1952, this lawn building project was going on in the apartment house area, is that so?

A. Yes. [134]

Q. And these wire fences were maintained in general around all of the newly planted lawn areas?

A. They were maintained until about the month of September.

Q. Let me rephrase that.

They were installed around all of the newly planted lawn areas?

A. Yes.

Q. Now, the particular place where you fell, you have indicated that on Exhibit 5 in what manner?

A. Well, I was walking—

Q. Would you refer to Exhibit 5 and tell me how you have designated the place where you fell?

(Testimony of Jean Dooley.)

A. Well, I have designated the spot here by a red cross and the initial "J".

Q. By a red cross?

Can you tell me about how far that is from the building in which your apartment was located?

A. As far as the length of this room or possibly ten more feet.

Q. Now, isn't it so that that sidewalk or the place where you have indicated with a red cross is just a matter of five or six feet from the building in which your apartment was located?

A. From the building, but my apartment was on [135] the far side of that.

Q. Now, where was your apartment with respect to the place where you fell?

A. Probably 60 feet. You would go up the main sidewalk and turn to reach the entrance.

Q. However, your bedroom window to your apartment is probably less than 25 feet from this spot, is it not?

A. Possibly that, 25 feet.

Q. And during the time you lived there, you passed that particular spot that you have designated as the place where you fell many times, is that not so? A. Yes.

Q. Daily you went past there, did you not?

A. Daily, but from the other walk. I was coming through a different walk this time, but the spot was passed daily.

Q. Well, the red cross which I see indicated on

(Testimony of Jean Dooley.)

Exhibit 5 as marking the place where you state you fell is right at the intersection, is that correct?

A. Yes. It is at the corner, as I was turning the corner.

Q. Well, now, daily you passed that very spot, is that not so? [136]

A. Yes.

Q. And sometimes you would pass it many times during the day?

A. I didn't make a turn as I was passing it like I did at this particular time.

Q. But irrespective of whether you went out your front door and down along the main sidewalk or whether you came out the back door and went out along the walk you were proceeding at the time of this accident, you passed within two or three feet of this very spot?

A. That is right.

Q. And that was the main route you used to go to the store?

A. Yes.

Q. Or to your automobile?

A. Yes.

Q. Or to take your children over to the play-field?

A. No, just to the store daily, was about all.

Q. So, in the course of your life there at the apartment, you would pass that spot many times and probably several times in one day?

A. Possibly, yes.

Q. Did you see this wire down along the walk, [137] as I believe it was Mrs. Hart testified she had seen it during the week before this accident occurred?

(Testimony of Jean Dooley.)

A. No, I can't say that I noticed that particular wire before the accident.

Q. But you went by that spot many times, didn't you, during that week? A. Yes.

Q. When you left your apartment on the evening of the accident to go to the meat market, did you look at the clock before leaving, or at a clock or watch before leaving? A. Yes.

Q. Was it your own watch that you consulted, or a kitchen clock?

A. It was a clock in my house.

Q. And did you leave immediately then for the store?

A. Well, I deposited my two children next door, across the hall, before leaving.

Q. Well, what time did that clock say when you looked at it last before leaving?

A. Actually, I couldn't tell you in minutes, except for the fact that I had approximately fifteen minutes to get to the store. I left my children there, and that probably took three or four minutes, and then [138] left shortly thereafter.

Q. Did you put on your coat after that?

A. I don't know if I had it on when I went over, or not.

Q. Well, did you have your coat on when you looked at the clock?

A. I couldn't be sure of that.

Q. Did you anticipate — you weren't wearing your coat around in your apartment, were you?

A. No. Either I took the children over and came

(Testimony of Jean Dooley.)

back and got my coat, or else I had it on to start with, but I am not sure.

Q. But in any case, you looked at the clock, and it said about fifteen minutes before six?

A. Yes.

Q. And then you took your children over to your neighbor lady's apartment? A. Yes.

Q. Now, before doing that, did you inquire to see whether or not she could care for them?

A. Yes, I had just been over and asked her.

Q. So, on the first trip over, after looking at the clock, you asked if she could care for them for a few minutes?

A. I don't know when I looked at the clock. All [139] I know is that I had a short time to get to the store before it closed.

Q. Well, to the best of your recollection, did you put on your coat then after taking your children over?

A. I am afraid I couldn't answer that.

Q. Well, did you go and get your purse then so you would have some money at the store?

A. Unless I had the money in my pocket. I just don't know. It has been a long time.

Q. Were there any other things you think you did or may have done before you left the apartment after checking the time? A. No.

Q. You can't think of any others?

A. No.

Q. Did you stop to fix your face, as so many

(Testimony of Jean Dooley.)

women do, or comb your hair before going out to the store? A. Not that I recall.

Q. Then you left the apartment by the rear door, the basement door?

A. By the inside entrance, which is next door to my door in the hall, that leads to the basement.

Q. You stepped out of your own door and walked down into the basement of the building?

A. Yes.

Q. And then left the building through the——

A. Outside basement exit.

Q. Will you mark on Exhibit 5 about where that door is in the building in which you have indicated your apartment was?

A. Well, I couldn't be sure. Do you mean the inside door that I went down?

Q. I mean the door outside, from the basement to the exterior of the building, the basement door. Just put a "BD" on it, for "basement door".

(Witness marks Exhibit 5.)

Q. Now, that is not the main entrance of the building, is it? A. No.

Q. That is to the rear side of the building?

A. Yes.

Q. And from there, you proceeded through a drying yard? A. Yes.

Q. Is that yard commonly used at night by the tenants?

A. It was quite well lighted there.

Q. In the drying yard?

(Testimony of Jean Dooley.)

A. I don't know if they use it or not. It was [141] convenient.

Q. And it was quite well lighted?

A. Yes.

Q. By "convenient", you mean that that formed a convenient exit to the building?

A. Considering that I wanted to go to the basement first.

Q. What did you want to go to the basement first for?

A. I had a twofold purpose. One was to survey the washing facilities. They were in the basement. I thought of washing later if they weren't in use.

The other, I was avoiding a worrisome neighbor.

Q. You mean a neighbor close to your front door? A. Yes.

Q. Then, you could have left by the front door or main exit to the building except for those two situations? A. Yes.

Q. Now, is the main exit, the front exit of the building, any more amply lighted?

A. No more so.

Q. Did you do anything else then before leaving? [142] A. No.

Q. Would you indicate by a red-dotted line on Exhibit 5, your route, from the time you left the basement door until the time you fell, as nearly as you can recall?

A. I can recall it very clearly.

(Marks Exhibit 5.)

Q. Would you estimate that by the time you

(Testimony of Jean Dooley.)

had reached the basement door down there, and had left to go outside, that possibly six, seven or eight minutes had elapsed since you first looked at the clock and then placed your children with the neighbor and then prepared to go to the store?

A. From the time I left my children, not more than two minutes had elapsed from the time I was through the basement and outside.

Q. But from the time you looked at your clock and took your children over to the neighbor lady and arranged for her to care for them, would you estimate that as much as six, seven or eight minutes may have elapsed? A. Possibly.

Q. The meat market, incidentally, to which you were going, closed at six o'clock, did it not?

A. That is right. [143]

Q. You were then in a considerable hurry to get to the meat market before the closing hour?

A. No, I had about—as I have said, all along, the time element here is strictly approximate. I am not sure, but I had ample time to get there. I can walk it in two minutes, and not more than three, and as I recall it, I had close to ten minutes to get there.

Q. Didn't you testify at the time your oral examination was taken, that you were hurrying?

A. I was hurrying.

Q. Why were you hurrying?

A. Well, because I was just walking in a hurry.

Q. Weren't you hurrying because you were fear-

(Testimony of Jean Dooley.)

ful that the market might close before you got there?

A. No. Actually, I don't walk fast any more, but that was my first time out of the house that day—and more or less for the exercise.

Q. Oh, you were just exercising? You weren't really hurrying to get to the market?

A. Well, no particular reason for hurrying, just hurrying.

Q. Do you recall the occasion on August 27, 1953, when your oral deposition or oral examination was taken in Mr. Guimont's office? [144]

A. Yes.

Q. Do you recall whether or not at that time you testified that you were hurrying to get to the meat market before it closed?

A. Well, I don't recall having said that. I do know that I was en route to the meat market, and I was hurrying, but I had ample time to get there.

Q. Is it your testimony then that you may have so testified at that time that you were hurrying to get to the meat market?

A. If you have it on the record that I said it, I presume that I said it, but actually, I was hurrying, and I hoped to get there before it closed, but I did have ample time.

Q. This walk along which you have indicated your route ran from the time you left your basement door until you reached the point where you fell formed one side of a rather long triangle, as

(Testimony of Jean Dooley.)

far as the direct line of your route was concerned, did it not? A. That is right.

Q. In other words, it would have been considerably shorter for you to have proceeded straight ahead as you came out of the drying yard and proceeded across the newly planted area there, would it not?

A. No, that wouldn't have been very sensible, [145] for the reason that there are cars at night there parked so densely that most people can't park at all. They have to park down the street, but had I gone that route, I couldn't have got through the cars there.

Q. Do you recall whether or not there were any cars parked there that evening?

A. Not that evening, I didn't look, but I know every evening they have considerable parking trouble.

Q. It would, however, have been considerably shorter for you at any time you walked along the path to turn to the right and walk across the grass area?

A. No, it wouldn't have, because at the end of that path, there was a drop of about four feet. It is a little rockery about four feet between the lawn and the sidewalk.

Q. Would you indicate on the drawing where this drop-off is, just write "drop-off"?

A. Yes. (Writes on Plaintiffs' Exhibit 5.)

That is near the laundry entrance, if I marked it correctly.

(Testimony of Jean Dooley.)

Q. Well, would you consider that mark again, Mrs. Dooley? Haven't you indicated the drop-off to [146] be right across your route and path?

A. Possibly I marked it wrong.

Q. Would you check that again, please?

A. I will check it. Oh, I certainly did mark it wrong. (Marks Plaintiffs' Exhibit 5.)

Q. You have lined through the original one you used to designate drop-off.

The present mark as it now stands is out at the edge of the Southwest 136th Street?

A. Yes.

Q. Well, now, isn't it true that this newly planted grass area which adjoined the sidewalk along which you were proceeding caused you to go a matter of 50 feet farther out of your direct line of travel from the apartment house building to the sidewalk nearest where you could approach directly to the stores?

A. Well, if I understand that, it is very far from true.

I know that I was walking down the middle of the sidewalk and at the corner was where I fell. There was wire in my path.

Q. Now, did you state that you fell as you turned?

A. As I was about to, or in the process of. [147] I am not sure just which step I fell on.

Q. Do you know which foot first came in contact with some object?

(Testimony of Jean Dooley.)

A. No, I wouldn't know. I just felt wire at my legs.

Q. Whereabouts on your legs?

A. It was low, low enough, below my knees, I am sure, and somewhat above the ankle, probably halfway.

Q. And which leg, do you recall?

A. I don't recall. I was aware that I was going to fall. I do know that.

Q. When you finally came to rest, were you opposite the telephone pole, or just where were you with respect to the telephone pole at that little corner when you came to a stop, or a rest?

A. Well, I was laying full length toward the parking area, and with my feet pointed in the direction I had come from.

I was on the corner, right at the corner, and that is near the telephone pole.

Q. You were lying full length, you stated?

A. Yes.

Q. And your head was in which direction?

A. Toward the parking area. [148]

Q. Well, now, that is a large parking area there?

A. Well, then, toward the main highway, then.

Q. Toward the main road for the intersection of that area parking road and the main road?

A. Toward 136th Street.

Q. Then opposite the direction from which you were walking as you proceeded along the park, that

(Testimony of Jean Dooley.)

is not opposite, but approximately 90 degrees to the right?

A. I don't know my degrees that well. I am sorry.

Q. Well, as you were walking along the sidewalk, your direction was at right angles from the position in which you found yourself lying after you had come to a rest?

A. I am sorry. I just don't follow the statement there.

Q. Does the position in which you were lying after you came to a rest indicate that you had turned or changed your direction?

A. Well, I would say that I had to either—I would say it was just as I was beginning to turn from the position I found myself in.

Q. And where was the telephone pole with respect [149] to your body?

A. To my right.

Q. To your right? A. Yes.

Q. Immediately to your right, or was it ahead of you, or behind you, or where was it?

A. Somewhat ahead, and almost even with me.

Q. Somewhat ahead?

A. Well, probably out like this (indicating). Possibly I could have touched it with another foot.

Q. You are indicating that you could have touched it?

A. I was on the sidewalk. As the sidewalk makes the corner turn, I was on the sidewalk, and

(Testimony of Jean Dooley.)

that is at the right. That is as well as I can explain it.

Q. In other words, the telephone pole was on your right? A. That is right.

Q. And could you have reached it with your hand stretched out straight?

A. I didn't try and I don't suppose I could. I do know that I had the thought in mind, as I was trying to pull myself up, of pulling on this pole, but I couldn't get on my foot, and couldn't get to it, so I must have been a few feet from it. [150]

Q. When you first came in contact with some object, did you fall immediately?

A. No. Actually, I stumbled several steps before I did fall.

Q. And several feet from where you first stumbled until you came to a rest?

A. Or a couple of steps or something. Anyway, I had time to know I was going to fall. I do remember that.

This was very specific, and I am afraid I can't be too specific about these things, but I don't recall.

Q. Is there any reason why you were unable to catch yourself from falling?

A. No, I just fell. I knew I was going to fall, and my main thought was to try to catch it on my hands and not fall flat.

Q. I mean, when you first came in contact with this object, let's say the wire, is there any reason

(Testimony of Jean Dooley.)

why then you couldn't have caught yourself and prevented yourself from falling?

A. Oh, I couldn't have prevented it.

Q. Is there any reason why you couldn't?

A. Well, I felt the wire first with my leg, and then my feet were entangled, and my feet were engaged [151] and I knew I was falling.

Q. Why didn't you just stop?

A. I think I did. I fell about that time.

Q. I mean, just stop your forward motion, or stop proceeding forward? Is there any reason why you didn't?

A. Well, I was stumbling forward.

When I tripped, I stumbled forward, and was about to regain my footing, I think, when I plunged down on this knee, and that is when it happened. But I can't describe that accurately.

Q. Now, did you testify that this wire was loose?

A. It was loose. I am sure it was loose, because I didn't see it as I fell. I saw it immediately after I had fallen, and there was a loose wire.

I couldn't say just how long it was, but there was quite a few feet of it, and I was in the middle of the sidewalk.

Q. If this was a loose wire then, it didn't offer you any immediate or abrupt existence, did it?

A. I was entangled in it. This wire, when it is loose—I have seen it many times in other spots—

Q. Could you just answer my question? If this

(Testimony of Jean Dooley.)

was a loose wire, it didn't offer you any immediate and [152] abrupt resistance to your forward progress, did it? A. It did.

Q. Well, then, was the wire loose, or was it tight?

A. I didn't see it before I fell. I have always figured it was loose. I know it was loose, because it was loose when I pulled myself up from the fall, and it is quite possible that when it is loose, it curls. These wires always coil back to their natural shape, and possibly I stepped into one of the coils.

Q. I think you have gone somewhat astray from my question. You say you didn't see this wire before you fell? A. No.

Q. And you say it offered abrupt and immediate resistance to the forward progress as you were walking along there?

A. Well, I would just say I tripped, and that the tripping caused me to stumble forward a few times, and I fell.

Q. Well, did the wire give with your forward progress, as you came in contact with it?

A. I couldn't say.

Q. You don't know, then, do you, whether the [153] wire was loose or tight when you tripped?

A. I figured if it was tight, it would have to have been tied to something on the other side, and it would have been higher up, no doubt, but it was around my feet.

(Testimony of Jean Dooley.)

Q. Just answer my question. You didn't see it, did you, before you fell? A. No.

Q. And you state it did offer immediate and abrupt resistance to any forward progress that you were making at that time?

A. I guess so.

Q. Did you have any sensation of pain when your leg or legs hit the wire?

A. Not when they hit the wire. When I hit the pavement——

Q. I take it that if you had stumbled several steps before actually falling, you started to stumble before you had reached the point on the sidewalk opposite the telephone pole, is that correct?

A. It was very close to the telephone pole and at the corner. I felt the wire and stumbled probably just a couple of steps ahead and fell.

Q. By "a couple of steps ahead of you", you mean that the telephone pole was still a couple of steps [154] ahead of you along the path of the sidewalk at the time you first stumbled?

A. I am sorry. I am trying to be cooperative, but I just don't understand that.

Q. Will you indicate on Exhibit No. 5, with a black pencil, probably—make a dot or something a little larger than a dot, probably a little cross, indicating where you believe you first came in contact with any object as you were walking along?

(Witness writes on Plaintiff's Exhibit No. 5.)

Q. Now, have you indicated a position different

(Testimony of Jean Dooley.)

from that where you believe you were when you finally came to rest?

A. Well, it is a little closer. I mean, where I came to rest was two large steps probably ahead of this spot.

Q. I wonder, Mrs. Dooley, if you would be good enough to draw a short line to that spot and designate it by a number one? That is for clarity.

(Witness draws on Exhibit No. 5.)

Q. Exhibit No. 8, the picture which you took some five or six weeks after the accident, is that the way that this wire barricade along the walk that you were proceeding along looked when it was in proper [155] condition prior to the accident?

A. This picture isn't very plain. I can see it, but there is a stake missing.

In fact, without the rest being visible, I couldn't tell you that, the rest of the corner, but when it was first installed, this covered the corner completely, but it isn't there now. It wasn't there the first time I noticed it after the accident. The stakes were gone, and this long piece of wire from the last pole there had been wrapped around the telephone pole the dangling wire which I surmised afterwards was what I had fallen on.

Q. Your testimony is then that prior to the accident, prior to the time you fell, there was another stake there at that corner?

A. Many weeks prior. I don't know just what the condition was just at the time I fell.

(Testimony of Jean Dooley.)

Q. Do you know what it was the day before you fell? A. No, I don't.

Q. Did you pass that way the day before you fell?

A. I usually go out every day, unless it is raining. I don't know if I went the day before, or not.

Q. You don't recall seeing it in any other condition the day before you fell?

A. I usually watch just the ones around the area where my children play.

Q. Did you testify though that you went by that way daily? A. Yes.

Q. When you stated, Mrs. Dooley, that there was no more maintenance on these fences after the time the painters were there, don't you really mean by that that you didn't see anyone maintaining these fences after that time?

A. That is what I mean. I didn't see him any more, and from the looks of the fences, I was pretty sure no one had, or else they had been torn down again as soon as he had.

Q. What was that?

A. I meant that I didn't see him any more. Possibly I could have missed him, but from the appearance of the fence, I would say that no one had worked on it.

Q. Are you referring to the particular fence now that is shown in Number 8, or just the general condition?

A. The general condition around my house.

Q. Calling your attention to Exhibit No. 5 again,

(Testimony of Jean Dooley.)

[157] do you recall the existence of a light at the intersection shown on that drawing, the intersection of the street there designated as 137 or 136th Southwest and the private drive off that into this parking area, do you recall that street light at that intersection? A. No, I don't.

Q. Do you know whether or not there is a light there?

A. I know that once I passed by the spot after I was able to be up and around for the purpose of seeing just how dark it was. This was after I had talked to you at the deposition, and for the purpose of seeing how the lights were situated, because I had been asked then and didn't really know, and the one on the building about 60 feet from there is the only one I saw.

Q. Isn't there a light at the intersection? I believe you have your finger on it now, and I have attempted to describe it. Isn't there a street light—let's call it on a light pole—at the present time?

A. I have never noticed it.

Q. And yet you have been out there in that area to check the lighting?

A. That is right. [158]

Q. Can you testify that there is not such a street light there now?

A. No, I can't. I can testify that when I made this survey of the lighting, I didn't notice it. Maybe I noticed it, and don't remember it now, but I would have remembered it, if I thought that that light was sufficient enough to affect this spot

(Testimony of Jean Dooley.)

I was considering, but there are many cars parked between that end and this spot.

Q. Right now, though, you don't know whether there is a light at that intersection?

A. No, but I never noticed it.

Q. Did you check the lighting in this spot in and near where you fell?

Have you been out there in the dark to observe the condition of the light in that area?

A. I have been out several times since then and noticed that that spot is completely obscured by what I thought at the time was this high wooden fence over the sandbox.

Q. What, if anything, have you noticed about the light from the floodlights in the market area?

A. I have never noticed them.

Q. Have you observed whether or not they cast any light or reflected illumination on the sidewalk in [159] the immediate vicinity where you fell?

A. No. As I said, the times I have checked it, several times, it was quite dark in that spot, so possibly they weren't on. I don't know.

Q. Do you know whether or not they were on then?

A. No. I have never noticed them.

Q. Have you ever observed that area when you knew that they have been on?

A. I never knew they had floodlights until you brought it to my attention.

Q. At the present time, you care for your three children, do you, Mrs. Dooley?

A. Yes.

(Testimony of Jean Dooley.)

Q. And did you, last summer, when your husband was in Alaska? A. Yes.

Q. That scar that you referred to on your knee is below the level of your skirt length, the ordinary skirt length, is it not?

A. No. It is above.

Q. I mean, it is above. A. Yes.

Mr. Bateman: I have no further questions, your Honor. [160]

The Court: Any redirect examination?

Mr. Guimont: I don't believe I have any further questions.

The Court: You may be excused from the stand, Mrs. Dooley.

(Witness excused.)

The Court: Call the next witness.

Mr. Guimont: We rest, your Honor.

The Court: The Plaintiff rests. The Defendants may now proceed.

Mr. Bateman: May it please the Court, and come now the Defendants, United States of America and Carroll, Hedlund & Associates, Inc., and move the Court that the plaintiffs' complaint be dismissed with prejudice as to both of the defendants for the reason that the plaintiffs have not produced sufficient evidence to establish a cause of action against the defendants, or either of them, and if the Court please, I should like to argue the motion.

The Court: I am sorry. I do not wish to hear arguments. The motion will be denied.

Mr. Bateman: Exception.

The Court: Allowed.

Mr. Bateman: The defendants will call Mr. Kelvin Greenstreet. [161]

KELVIN GREENSTREET

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you state your full name? A. Kelvin Greenstreet.

The Court: Spell it.

The Witness: K-e-l-v-i-n G-r-e-e-n-s-t-r-e-e-t (spelling).

The Court: You may proceed.

Q. (By Mr. Bateman): And what is your occupation, Mr. Greenstreet?

A. Chief property manager, Federal Housing Administration.

The Court: Where?

The Witness: Seattle.

Q. (By Mr. Bateman): How long have you been so employed?

A. Since late 1949 in that particular capacity, and with the Administration since 1939.

Q. Showing you Plaintiffs' Exhibit 5, do you recognize that drawing? A. Yes. [162]

Q. In your capacity as property manager for

(Testimony of Kelvin Greenstreet.)

the Federal Housing Administration, have you had anything to do with the Lake Burien Heights Apartments Project?

A. Yes, it is under my jurisdiction. It is my responsibility to see that the Federal Housing Commissioner's interests are upheld from a management standpoint, since he is the owner.

Q. And, referring again to Exhibit 5, is that the area of the Lake Burien Heights Project?

A. Yes.

Q. That property comprised within the property lines as shown on that exhibit is owned by the Federal Housing Administrator? A. Yes.

Q. And, in a general way, will you describe the Project, the approximate number of buildings, the area, the number of tenants, something of that nature?

A. There are 544 dwelling units in 44 apartment buildings, and then there is also a nursery school and a community center, which we built about a year and a half ago. It is called a garden-type project, designed principally for families with children to serve the gap between the single family house and the downtown apartment house type where there [163] is very limited ground.

Q. Children are encouraged in the project, are they?

A. Yes. It was designed for families with children. A large number of two-bedroom type units were provided for that reason. In fact, there are 24 three-bedroom type units.

(Testimony of Kelvin Greenstreet.)

Q. What, if any, landscaping is there in it or on the project site?

A. All of the areas between buildings are intended to be well-landscaped, to be pleasing to the eye, as well as for ease of maintenance and cleanliness and safety.

Q. Is there a lawn area in that project?

A. Yes. We had occasion recently to pull a figure out of the hat as to exactly how much lawn area there was for sprinkling purposes, and, as I recall, the figure was 144,000 square feet.

Q. Was there in 1952 any concerted program for the development of the lawn areas in that project?

A. Well, yes. We were improving the lawn areas, replacing some of the lawns that were not growing properly. We were also replacing shrubbery.

Q. Do you know by whom that work was done?

A. Miller-Hansen Landscape Contractors. [164]

Q. And what, in a general way, was the work that they were to perform?

A. The scope of their work involved not only new planting beds and rebuilding lawn areas, but also installing additional walks for tenant convenience, and increasing the turns at sidewalk intersections to make it safer for easier turns, also providing more space around entrances for storage of kids' bikes, et cetera, to keep them out of the way of traffic.

(Testimony of Kelvin Greenstreet.)

Q. Do you know when that contract was performed?

A. Well, there were two contracts, one of them was under way in '52. I don't have the dates with me.

Q. Do you know by whom the project was designed when it was originally constructed?

A. Miller & Ahlson, Architects.

Q. Do you know anything about Miller & Ahlson, Architects?

A. They designed several other similar projects. They are well-regarded in the area as designers. We found them cooperative and able.

Q. They practice here in Seattle, do they?

A. Yes.

Q. Do you know whether or not they also laid [165] out the design for the exterior, or outside, lighting within the project site?

A. I can't say as to that. They may have done it themselves, or hired it done. It was their obligation, however, to provide proper lighting. That was one of the requirements.

Q. Did you have anything to do with the approval of their designs in that respect?

A. Well, I was the appraiser. I appraised the property for the original mortgage, and in my analysis, I had certain recommendations to make as to living unit designs, as well as placement of buildings and general layout of the project.

Generally, I might have come in contact with it.

(Testimony of Kelvin Greenstreet.)

I can't remember exactly what I might have said about lighting at the time, but it was considered.

Q. And, to your knowledge, it was an obligation of the architects, Miller & Ahlson, to handle that as part of their architectural services on the property?

A. Yes, it was, very definitely.

Q. What are the present arrangements, as far as the management of the project is concerned?

A. The project is now being managed under a [166] contract with Carroll, Hedlund & Associates as our broker.

Q. How long have they been managing the area? A. Since August, 1950.

Mr. Bateman: That is all. You may inquire.

Cross Examination

Q. (By Mr. Guimont): You were in charge of the project, then, prior to Carroll, Hedlund & Associates taking over the managership in your stead?

A. The question is a little difficult to answer since you have used the words "in charge of".

Do I understand the question properly?

Q. Yes, I believe you said you had been their chief property manager for Federal Housing Administrator since 1949? A. Yes.

Q. How long has the project been in existence?

A. Well, the project was completed about 1948. I believe first occupancy came along in 1948.

We acquired the project in August, 1950. That

(Testimony of Kelvin Greenstreet.)

may be the date you are looking for. We didn't acquire it until that time.

Q. And then, after you acquired it, you immediately turned it over to your agent, Carroll, [167] Hedlund?

A. Yes. The day we acquired it, they became the brokers.

Q. And their duties as brokers, will you briefly tell us what they do out there?

A. Under our supervision, they manage and have complete charge of the ground crew, the housekeeping crew as to the unit, and are our agents of record with respect to hazard and other types of insurance. They are completely our managers and representatives and are responsible for the care of the project.

Q. Now, you speak of having in 1952 made an effort to improve the lawn areas. Who hired the people that were doing the work? I believe you called them Hansen Landscape Contractors?

A. Miller & Hansen. Mr. Connor, Director of Administrative Services, Washington, he actually signed the contract.

Q. For the improvement of the property?

A. Yes.

Q. And then you authorized your agent, Carroll, Hedlund & Associates, to carry out the improvement?

A. No, no. Miller-Hansen did all the improvement work. Carroll, Hedlund are maintaining it,

(Testimony of Kelvin Greenstreet.)

if I may add. They are the maintenance. They furnish a maintenance crew.

Q. I see. They maintain the grounds, do they, the sidewalk areas? A. Yes.

Q. The drying areas?

A. I might add, we call them a unit of work. This type of work Miller-Hansen did was a unit of work that was beyond ordinary maintenance. It was in the way of refurbishing and improving and bettering the project.

Q. Then who had charge of the lawn cutting?

A. The lawn cutting was Carroll, Hedlund & Associates.

Q. And the lawn watering? A. The same.

Q. And had you been out to the project yourself? A. Yes, regularly.

Q. And when you were out there, what did you observe about the planting of lawns and the like?

A. Work was progressing satisfactorily.

Q. And did you have occasion to visit the area in the vicinity of the Dooley apartment as shown on Exhibit No. 5? [169]

A. I don't recall any specific inspection I made of that area.

Q. In your inspection tour of the premises generally encompassed in the project, do you recall anything about the barricading of the areas newly planted? A. Yes, I remember seeing them.

Q. And did you ever observe anything about them in any portion of the project that was not up to what we might call snuff?

(Testimony of Kelvin Greenstreet.)

A. I have never had to report that condition.

Q. Did you ever hear of any reports of the barricades being down or knocked over?

A. Never received a report of it.

Q. And did you ever hear of any accidents occurring to any of the tenants?

A. No, no report made of it.

Q. Who would receive that kind of report?

A. Carroll, Hedlund.

Q. How often did you visit the project?

A. Depending upon the need. I was there anywhere from daily to weekly.

Q. Would that have been in 1952, in November?

A. Yes.

The Court: Do you have substantial further [170] cross-examination?

Mr. Guimont: No, I believe I am finished with this witness.

The Court: If you have just a few questions, I don't want to interfere at this time. If it were substantial——

Mr. Guimont: No. I believe this will conclude my cross-examination.

Mr. Bateman: I have just one additional question.

Redirect Examination

Q. (By Mr. Bateman): In connection with the drawing that you hold there, Plaintiff's Exhibit No. 5, Mr. Greenstreet, that drawing is prepared of the site as it actually exists at the present time, so far as designations are made on that drawing?

(Testimony of Kelvin Greenstreet.)

A. As I understand it, this is the way the project exists as of February 15, 1954. That is the date shown here on the plans itself.

Q. Do you recall the purpose for which that was prepared?

A. Yes. We ordered this topographical map made, so that we might install a new lawn sprinkler system. [171]

Q. And that was prepared by the engineering firm shown on the corner of the drawing?

A. American Engineering Company was the contracting engineer, yes.

Q. And that is shown on the drawing?

A. Yes. It is very vague, but it is here.

Q. Now, referring to the area where you will find some red marks, et cetera, on this drawing, in that general area do the topographical lines indicate that the area is generally level? A. Yes.

Mr. Bateman: No further questions.

Mr. Guimont: No further questions.

The Court: You may be excused.

(Witness excused.)

The Court: The Court will be adjourned until tomorrow morning at ten o'clock.

(At 4:30 o'clock p.m., Wednesday, March 10, 1954, proceedings recessed until 10:00 o'clock a.m., Thursday, March 11, 1954.) [172]

Seattle, Wash., March 11, 1954, 10:00 o'clock a.m.

The Court: You may call the next witness, **Mr. Bateman**.

Mr. Bateman: May it please the Court, the defendants at this time will call Dr. Duncan.

The Court: Mr. Bateman, was it the wish of the defendants to waive their opening statement?

Mr. Bateman: Yes, your Honor.

DR. WILLIAM R. DUNCAN

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Doctor, will you state your name, please?

A. William R. Duncan.

Q. And what is your address?

A. 3724 Cascadia Avenue, Seattle, Washington.

Q. And do you maintain an office in Seattle?

A. Yes, sir; I do at 1607 Medical-Dental Building, Seattle, Washington.

Q. What is your occupation?

A. I am an orthopedic surgeon. [173]

Q. Do you practice in Seattle?

A. Yes, sir; I do.

Q. Are you licensed by the State of Washington?
A. Yes, sir; I am.

Q. What training have you had, Doctor, in that field?

(Testimony of Dr. William R. Duncan.)

A. I am a graduate of McGill University. I had two years of internship, three years of residency in orthopedic surgery, three and a half years of Army experience in orthopedic surgery.

I am certified by the American Board of Orthopedic Surgery, and am a member of the American Academy of Orthopedic Surgery.

Q. Have you had occasion to examine the plaintiff in this action, Jean Dooley, in a professional capacity? A. Yes, sir, I have.

Q. On or about what date?

A. On February 1, 1954.

Q. And what was the nature of the examination that you made?

A. I took a complete history, including the past medical history, her complaint and did an examination, and took X-rays. [174]

Q. What, if anything, did you find?

A. I found that Mrs. Dooley had had an injury on November 5, 1952, when she had tripped over a wire. She had sustained a fracture of the left kneecap. She was treated by Dr. Paul Ruuska. An open operation and the repair of the kneecap was done.

At the time of my examination, the fracture was solidly healed in good position. There was full function in the kneecap except for loss of the last 30 degrees of flexion, of full flexion. X-rays showed solid healing. There was no arthritis present in the joint.

Q. Did you form an opinion as to the quality of

(Testimony of Dr. William R. Duncan.)

the results achieved in reducing or setting of that fracture? A. Yes, I did.

Q. What is that opinion?

A. I felt that she had had an excellent reduction, and had had an excellent result from the treatment of a fractured patella.

Mr. Bateman: You may inquire.

Cross Examination

Q. (By Mr. Guimont): Doctor Duncan, you took X-ray pictures, did you? [175]

A. Yes, sir; I did.

Q. What did you find the X-ray pictures disclosed with reference to the patella?

A. Anterior-posterior—that is front and back and side views of the left knee showed a healed fracture of the mid portion of the patella.

The fragments were healed in excellent position. There was a slight irregularity of the under surface of the patella.

No arthritic changes were seen. The joint space was well preserved.

The Court: That is what you found when you examined?

The Witness: Yes, sir.

Q. (By Mr. Guimont): Now, Doctor, did you say you did see a slight irregularity showing on the X-ray pictures of the under surface of the patella?

A. Yes, sir.

Q. What effect would that have on the patient, that irregularity of the under surface of the patella?

(Testimony of Dr. William R. Duncan.)

A. Well, this irregularity was so slight that it should have no effect upon the patient.

Q. If the patient complained of pain on kneeling, would you feel that there had been any [176] difficulty—I mean placing her weight on her knee, do you think that that slight abnormality under the patella is contributing to the pain that she complains of?

A. I am sorry. You mentioned first pain on kneeling and then pain on weight-bearing. Which did you mean?

Q. Well, when she kneels and places her weight on the patella.

A. On the kneecap?

Q. On the kneecap?

A. Well, in the kneeling position, it is very difficult to put the weight on the patella. The weight comes on the upper tibia unless one gets on all fours and bends the knees up, but on straight kneeling, the pressure comes on the tibia, and I would not associate it with the fractured patella.

Q. Is the patella a movable bone area?

A. Yes, sir; it is.

Q. And did you find any crepitus or grating in the kneecap?

A. No, sir; I did not, as I recall.

Q. Now, would this fracture be as severe, Doctor, as a break in one of the long bones of the leg?

A. No, sir. [177]

Q. Do you think that the site of the fracture adds any additional difficulty to this type of frac-

(Testimony of Dr. William R. Duncan.)

ture other than as compared to site of a fracture, for instance, in the middle of the femur?

I am trying to find out, if, in your opinion, a fracture of the joint area, such as this, has any greater severity in the after effects on a patient than a fracture in another area of the leg?

A. Not this particular fracture, no, sir.

Q. You don't think that the mechanism of the knee is such that a fracture in the patella causes and is apt to cause a greater future difficulty than if this fracture were, for instance, in the tibia?

A. Well, I think you have to qualify the type of fracture that you are talking about in the patella. If it were a shattered patella, badly comminuted, which healed with gross irregularity and the fragments were not removed, then you have a more serious problem than a fractured tibia.

Q. To what did you attribute the slight irregularity of the under surface of the patella?

A. Well, that I attribute to the ever-present inability to accurately replace and maintain the fragments in perfect alignment, that is, to maintain them without a few millimeters' shift one way or the [178] other. It is sometimes done, but usually we don't even approach this excellence in the result.

Q. Now, Doctor, did you find any limitation of motion in the knee?

A. Yes, sir; I did.

Q. What was that?

A. There was full extension—that is, straightening of the knee—present in both knees. There was

(Testimony of Dr. William R. Duncan.)

full flexion of the right knee. The left knee flexed to 45 degrees.

The Court: Now, will you indicate for all present, by your leg motion, what you mean by that last statement—flexion and limitation?

The Witness: (Demonstrating): This, your Honor, is full flexion, which makes an angle of approximately 30 degrees at the knee. That is this angle in here (indicating) would be approximately 30 degrees, which is considered full flexion, and which she had on her normal side.

On the affected side, she had flexion so that this angle made 45 degrees. Bent to a right angle, would be 90 degrees, and she bent to 45 degrees, demonstrating a loss of full flexion of approximately 15 degrees.

Q. Now, did you measure her limbs, the [179] circumference of her limbs, Doctor?

A. Yes, sir; I did.

Q. And what did you find in the measurements of the right and left limbs?

A. I found that the right thigh measured 15½ inches five inches above the kneecap, and that the left thigh measured 14½ inches at the same level, indicating a difference of one inch five inches above the kneecap.

Q. Was that significant, Doctor?

A. It indicates that there is accuracy of the quadriceps mechanism, which has not as yet returned, that is, the volume has not as yet returned.

Q. What causes that atrophy? A. Disuse.

(Testimony of Dr. William R. Duncan.)

Q. And do you feel that it is going to be permanent?

A. No, sir; I do not.

Q. In view of the fact that your examination was in February of 1954, and that this injury was in November of 1952 and there is still atrophy present, is it significant in any way?

A. It is significant to me in this regard that the knee has not been used to its maximum capacity. The quadriceps mechanism, which we are measuring here, [180] and where the wasting occurs, can go through normal activity in normal life, exercising perhaps 30 per cent of its full load.

Now, unless Mrs. Dooley were to be quite active, and do vigorous exercise, it would take a long time before the volume will creep back to its normal measurement.

Q. What, Doctor, do you attribute the disuse to?

A. Well, I think that it is probably the type of life that she and we all lead.

I think that if I, myself, were to break my kneecap, I would have immediate atrophy of the quadriceps mechanism, and unless I resumed a more active life than before, it would take quite a while to build that back to normal, unless I were to do intensive, continuous, special exercises to do it, because the normal power of the quadriceps is so great that 30 per cent of its activity is enough to maintain average function.

Q. Would disuse, Doctor, have any relation to the injury?

(Testimony of Dr. William R. Duncan.)

A. It definitely does. It follows the injury. It follows any injury or immobilization of a joint. If a joint is immobilized, a knee joint, [181] for as little as three weeks, without injury, you will get within three weeks almost an inch of atrophy. It is very slow to come back.

Q. Is that a considerable atrophy that you found, one inch in circumference?

A. One inch is, I would say, an average atrophy following an injury such as this. I don't think it is a considerable atrophy.

Q. Well, it is not possibly considerable atrophy for an injury of this type, but it is considerable atrophy, is it not?

A. I would say it was average for an injury of this type.

Q. Is it average for injuries of some other type?

A. Yes, following a knee cartilage, a simple removal of a knee cartilage we will usually have an atrophy this great or greater.

Q. Doctor, did you find any limping tendency?

A. I believe I did, sir. I will have to check here (looks at document in his hand). I have no record of any limping.

Q. Now, did you note any scar on the skin surface? A. Yes, sir; I did. [182]

Q. And what kind of a scar was that?

A. There was a surgical scar on the inner aspect—that is, on the inside of the left knee—which extended from just above the superior pole, the

(Testimony of Dr. William R. Duncan.)

upper end of the patella, downward for a distance of four inches. The scar was well healed, not reddened, but is spread during its entire course, particularly in the mid portion——

Q. How wide is the spread?

A. I did not measure, but I estimate it is about three-eighths of an inch spread around there.

Q. Is it a severe looking scar, would you say?

A. That is not a very good question to ask a surgeon. It is not a severe looking scar, no, sir.

The Court: Did you say the length?

The Witness: It is four inches, your Honor.

Q. (By Mr. Guimont): Was that measured with the knee flexed, or with the knee straight?

A. With the knee straight.

Q. And on flexion of the knee, is that stretched?

A. I suppose you could stretch it a half inch or so.

Q. Now, you made but the one examination?

A. Yes, sir, I did.

Q. And how long was your examination, Doctor?

A. Approximately a half hour, I would guess.

Q. Ordinarily, would you feel that the attending Doctor is possibly more cognizant of the patient's difficulty than one who examines for just one occasion?

A. I think that the attending physician should have a better over-all knowledge of the patient. On the other hand, as far as evaluation of function and disability, I think sometimes an impartial ex-

(Testimony of Dr. William R. Duncan.)

aminer who is not close to the picture can elicit clearer information than one who is so close to it that it is sometimes distorted.

Q. The attending physician might be more inclined to feel the results of his work better than they actually turned out to be, isn't that true?

A. Well, I think it varies with the situation, with the case.

Q. Now, this type of injury ordinarily lends itself to considerable difficulty in later life, does it not? A. No, sir; it does not.

Q. In your opinion, there isn't any danger, then, I take it, from any after effects? [184]

A. I would not say that there is no danger, but I would say that it is not a probability, that these fractures are commonplace, and to get a result of this excellence reduces the possibility to a very low level.

Q. But they do have——

A. They do have trouble with fractured knee-caps, particularly the extensive comminuted ones which are not accurately replaced, as was done in this case.

Q. Doctor, did you have any history of the patient having been pregnant at the time of her fall?

A. Yes, sir; I did.

Q. Does that add anything to the situation as you view it?

A. The history that I attained was that at the time of the injury, she was six months pregnant, and that there were signs of impending abortion

(Testimony of Dr. William R. Duncan.)

as evidenced by recurrent pain and bleeding, and she finally did give birth to a normal, full-term child, and the child has been in good health.

Q. Do you recall whether she said six weeks pregnant, or six months?

A. Well, I have six months here. I could be wrong. I am sorry. I misread it. It was six weeks [185] pregnancy, and that throughout the next six months of pregnancy, she had the bleeding.

The Court: You say the symptoms of apprehension as to the safety of the unborn child condition continued for six months after the injury?

The Witness: Yes, sir. That is the statement. At the time of the injury, she was six weeks pregnant, and she states that throughout the next six months of pregnancy, there were signs of impending abortion, as evidenced by recurrent pain and bleeding.

The Court: That is sufficient. You may proceed.

Q. (By Mr. Guimont): Did she complain, Doctor, of pain sitting in one position for any length of time, that she then had pain in the knee?

A. She did not complain of pain. She states that the pain in the knee is not very remarkable, and that it is only an ache which is present when she has been sitting in one position for a long period of time.

Q. Did you note anything during your examination in the way of nervousness on her part?

A. Well, not in my examination, except that she volunteered that she had been extremely ner-

(Testimony of Dr. William R. Duncan.)

vous [186] since the accident, and felt that she was gradually getting herself under control.

Q. Doctor, was she cooperative in your examination of her?

A. Yes, sir; she was very cooperative.

Mr. Guimont: I believe that will be all.

Mr. Bateman: No further questions.

The Court: You may be excused.

(Witness excused.)

The Court: Call the next witness.

Mr. Bateman: May it please the Court, I have had the Clerk identify a number of exhibits, and I would like at this time to offer those in evidence.

The Court: Just a minute. Do you wish to say anything about whether the Doctor is to remain in attendance or not so remain?

Does the one who called the Doctor have any concern about that?

Mr. Bateman: No, your Honor. We would like to have the Doctor excused.

Mr. Guimont: I have no objection.

The Court: The Doctor is excused from further attendance and may go on about his business.

The Clerk: Your Honor, Defendants' Exhibits from A-1 to A-15, inclusive, have been marked.

(Drawing marked Defendants' Exhibit A-1 for identification.)

(Drawing marked Defendant's Exhibit A-2 for identification.)

(Photograph marked Defendants' Exhibit A-3 for identification.)

(Photograph marked Defendants' Exhibit A-4 for identification.)

(Photograph marked Defendants' Exhibit A-5 for identification.)

(Photograph marked Defendants' Exhibit A-6 for identification.)

(Photograph marked Defendants' Exhibit A-7 for identification.)

(Photograph marked Defendants' Exhibit A-8 for identification.)

(Photograph marked Defendants' Exhibit A-9 for identification.)

(Photograph marked Defendants' Exhibit A-10 for identification.)

("Fold-A-Pak" pictures marked Defendants' Exhibit A-11 for identification.)

("Fold-A-Pak" pictures marked Defendants' Exhibit A-12 for identification. [188])

(Lake Burien Heights Report marked Defendants' Exhibit A-13 for identification.)

(Employee Time Record marked Defendants' Exhibit A-14 for identification.)

(Weather Bureau Report marked Defendants' Exhibit A-15 for identification.)

Mr. Bateman: May it please the Court, we have identified Defendants' Exhibits A-1 through A-15, and have reached a stipulation with Counsel as to their identity, and their admissibility, and I would like to offer those at this time.

The Court: What is the attitude of both sides in pursuance of that stipulation?

Mr. Bateman: That they might be admitted at

this time, your Honor, and I might identify the exhibits as I offer them, and they will be admitted without objection.

Mr. Guimont: No objection.

The Court: You may proceed.

Mr. Bateman: Defendants' Exhibit A-1, may it please the Court, is a drawing of a portion of the area shown on Exhibit 5 heretofore admitted, being an enlarged scale drawing of the general area of the [189] Lake Burien Apartments Projects in which this accident is alleged to have occurred, and to which testimony has already been given.

This Exhibit A-1 is drawing to a scale of one inch equals 10 feet, and shows the apartment building in which the plaintiff had her apartment, the walk which has been testified to, and which is indicated on Exhibit 5, as well as other things, as shown on the drawing.

The Court: Admitted.

(Defendants' Exhibit A-1 received in evidence.)

Mr. Bateman: Defendants' Exhibit A-2 is a further enlargement of a portion of Exhibit 5, drawn to a scale of one inch equals two feet, and shows just the very corner of the building, and an enlarged scale picture of the sidewalk and lawn area, particularly involved in this case.

We are offering that in evidence.

Defendants' Exhibits A-3, A-4, A-5, A-6, A-7, A-8, A-9 and A-10 for identification are pictures of the area involved in this case.

We are offering those in evidence.

The Court: Each of those is now admitted in evidence. [190]

(Defendants' Exhibits A-2 through A-10 received in evidence.)

Mr. Bateman: Defendants' Exhibits A-11 and A-12 are each a series of pictures of the Lake Burien Apartment House Project site. They are offered to show the landscaping operations, activities and conditions, and the condition of the grounds, and they are offered in evidence as such, and for that purpose only.

The Court: Each of them is admitted.

(Defendants' Exhibits A-11 and A-12 received in evidence.)

Mr. Bateman: Defendants' Exhibit A-13 is a record kept in the usual course of the business of the management of Carroll, Hedlund of the Lake Burien Apartment Project, showing the Report of Hours Worked by Maintenance Personnel of the Lake Burien Heights Apartment House Staff.

The Court: What number is that?

Mr. Bateman: It is A-13.

It is for the months of October, November and December of 1952, showing by name the respective numbers of hours worked by the several employees who are listed on that exhibit, and who are maintenance and grounds personnel there. We are offering it in evidence, your Honor. [191]

The Court: Defendant's Exhibit A-13 is received.

(Defendants' Exhibit A-13 received in evidence.)

DEFENDANTS' EXHIBIT A-13

LAKE BURIEN HEIGHTS

REPORT OF HOURS WORKED—OCTOBER, NOVEMBER,
DECEMBER

	October	November	December	Total
Clarence Suder	200	180	200	580
George Larsson	188	180	200	568
George Enyeart	200	184	200	584
Walter Carlson	200	184	196	580
Frank Orman	200	180	200	580
William Betts	200	180	200	580
Nickolas Cvetikovs	200	180	200	580
Charles Bullock	196	188	192	576
Rachel Dalton	200	180	200	580
Robert McGuire	200	156	....	356
Chester McConville	200	188	192	580
Fred Walter	200	180	200	580
Boyd Goodall	200	180	200	580
Clarence Klees	184	92	....	276
Frank Petschow	200	180	200	580
Clayton Dykeman	200	92	....	292
Delos Bell	200	44	....	244
Arthur Carlson	68	....	....	68
Thomas Charles	92	....	....	92
Nels Berg	88	....	....	88
George Yamada	200	180	200	580
Harold Chase	200	180	200	580
Alvis Cook	200	180	200	580
Jacob Munsch	200	180	200	580
Ray Saunders	152	180	200	532
John Steele	200	180	180	560
	<hr/> 4768	<hr/> 3828	<hr/> 3760	<hr/> 12,356

Mr. Bateman: Defendants' Exhibit for identification A-14 is the Employees' Time Record of Clayton Dykeman for the period of October 25, 1952, through November 7, 1952, showing the number of

hours on each of those days worked by Mr. Dykeman. We are offering that in evidence.

The Court: It is admitted.

(Defendants' Exhibit A-14 received in evidence.)

DEFENDANTS' EXHIBIT A-14

EMPLOYEE'S TIME RECORD

Name: Clayton Dykeman. Classification: Janitor. Property:

Period ending: 11/7/52. Starting: Approved: Suder.

Date	Regular Time	Sick Leave Vacation	Date	Regular Time	Sick Leave Vacation
10/25	4	.....	11/1	4	.....
10/26	0	.....	11/2	0	.....
10/27	8	.....	11/3	8	.....
10/28	8	.....	11/4	8	.....
10/29	8	.....	11/5	8	.....
10/30	8	.....	11/6	8	.....
10/31	8	.....	11/7	8	.....

Total Regular Time: 11 days. Rate:.....Per:.....Amount \$.....

Sick Leave and Vacation Time:.....Rate:.....Per:.....Amount \$.....

*

Total Salary: \$.....

Sick Leave earned:.....Days Sick leave used:.....Days

Vacation earned:Weeks Vacation used:Weeks

Mr. Bateman: Defendants' Exhibit for identification A-15 is the certificate of the United States Weather Bureau, showing the time of sunset on November 5, 1952 to have been 4:40 p.m., Pacific Standard Time. At 4:30 p.m., the sky was overcast and visibility was seven miles.

We are offering that certificate in evidence, your Honor.

The Court: Admitted.

(Defendants' Exhibit A-15 received in evidence.)

DEFENDANTS' EXHIBIT A-15

United States Department of Commerce
Weather Bureau

Station: Seattle, Washington Date: March 5, 1954

As the custodian of the records of the U. S. Weather Bureau filed at 703 Federal Office Building, Seattle 4, Washington (1st and Marion), I hereby certify that it appears from such records that at the Weather Bureau Office, 703 Federal Office Building, 1st and Marion, Seattle, Washington, the following data was recorded on November 5, 1952:

Time of sunset was 4:46 p.m., Pacific Standard Time.

At 4:30 p.m. the sky was overcast and the visibility was 7 miles.

/s/ EARL L. PHILLIPS,
Climatologist

Mr. Bateman: There is one further matter.

The Bailiff has present in Court a calendar for the year 1952, and we would like to ask counsel for plaintiffs to stipulate that November 5 of that year fell on Wednesday of the week.

Mr. Guimont: I will so stipulate.

The Court: Let the record show that.

Mr. Bateman: Defendants will call as their next witness, Mr. George Cooley.

GEORGE R. COOLEY

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Mr. Cooley, will you state your name, please?

A. George R. Cooley.

Q. What is your residence address?

A. 1410 Lakeside Avenue, South.

Q. What is your occupation?

A. Electrical engineer.

Q. Do you maintain an office in Seattle?

A. At my home at the present time, yes.

Q. Are you licensed by the State of Washington? [193]

A. I am.

Q. As what?

A. Electrical engineer.

Q. How long have you held that license?

A. Since licenses were first issued. I think it was about 20 years ago.

Q. And what training have you had in that field, Mr. Cooley?

A. University of Minnesota. I wasn't a graduate. I attended two years and three quarters, and I have taken a course in correspondence school electrical engineering, which I completed, and I have attended lectures and classes at the University of Washington.

Q. And have you followed that profession since

(Testimony of George R. Cooley.)

you have become licensed as an electrical engineer?

A. Yes, sir.

Q. Mr. Cooley, what, if anything, did you have to do with the design of the Lake Burien Heights Project?

A. I laid it out, electrical work.

Q. Electrical work?

A. Yes, sir.

Q. By whom were you employed to do that?

A. Miller & Ahlson, the architects who were [194] employed by the Government.

Q. When did you do that work?

A. '42, I think, '42 or '43.

Q. In a general way, of what did that consist?

A. It consisted of all of the electrical distribution and the wiring of the houses, and all of the lighting on the project.

Q. Does that include exterior lighting as well as interior lighting?

A. Yes.

Q. You prepared drawings, did you, for that work?

A. I did.

Q. And to whom were they delivered or submitted?

A. Miller & Ahlson, the architects.

Q. Do you know whether or not those drawings were used in the construction and installation of the electrical system and lighting on the project?

A. There were some amendments to them, but not materially.

Q. And the project was constructed in accordance with your drawings, except for the amendments? [195]

(Testimony of George R. Cooley.)

A. Yes, and the amendments were interior wiring, and not outside.

Q. Mr. Cooley, have you had occasion to make an examination or measurement of artificial light in the absence of any natural light at the Lake Burien Project recently? A. Yes.

Q. When was that?

A. The 26th of February.

Q. Showing you, Mr. Cooley, Exhibit 5, that is a drawing of the Lake Burien Apartments Project site, showing you, also, Defendants' Exhibit A-1, that is a drawing on a much larger scale of a portion of the Lake Burien Heights Apartment House Project, can you orient yourself to those two exhibits and locate where on Exhibit 5 the enlargement has been taken, or from what portion of Exhibit 5 the enlargement has been taken?

A. Yes, sir.

Q. You testified that you made an examination or measurement of light there on February 27. What time of day?

A. It was about 7:10. It was the same time after sunset as you advised me that the accident happened.

Q. And what was the condition of light at that [196] time, of natural light?

A. There was none.

The Court: This was February 27, 1954 that you made this last observation?

The Witness: February 26.

The Court: Pardon. This year?

(Testimony of George R. Cooley.)

The Witness: This year.

Q. (By Mr. Bateman): By your statement that there was no natural light, what do you mean?

A. It was a dark night, no sky light.

Q. No light from the sun or after glow?

A. No.

Q. A condition during which it would get no darker that night? A. Yes.

Q. Can you indicate on Exhibit 5 the area of the Lake Burien Project site where you made that examination? A. Yes.

Q. Will you do so by placing your initials in that general area on Exhibit 5?

(Witness writes on Plaintiffs' Exhibit 5.)

Q. Will you state what letters you put in there?

A. I put my initials, "G.R.C."

Q. Now, will you please, on Defendants' Exhibit A-1 make the same indication by your initials from the place where you made your examination of the amount lights?

A. This doesn't appear familiar to me. I found it, yes, sir.

(Witness marks on Defendants' Exhibit A-1.)

The Court: In connection with the last question or two, the Court would be more certain of the scope of the witness' answers, if it were determined by proper questions whether his last answer was made with respect to both the artificial and the natural lighting condition at the time and place.

(Testimony of George R. Cooley.)

Mr. Bateman: Thank you, your Honor. We will clear that up.

Q. What light were you measuring on February 27? A. The artificial light.

The Court: Mr. Bateman, he corrected the Court's understanding about that date to the 26th, as I understood it.

Mr. Bateman: Oh, I am sorry.

Q. Was that the 26th?

A. The date I have in my memorandum is the [198] 26th.

Q. The 26th of February?

A. (Reading from document): 26th of February met Mr. Bateman and took the trip to the project. Made measurements at 7:15.

Q. Mr. Cooley, there was no natural light present at that time? A. No, none at all.

Q. And your measurements were strictly of the artificial light? A. Yes.

Q. What sorts of elimination were there in that area at that time?

A. Well, there was two street lights visible, and a light from a floodlight that was flooding a shopping center, and there was another light, floodlight, on the side of the building nearby.

Q. Will you, on Exhibit A-1, indicate those source of illumination by writing the letter "I" in the approximate vicinity or direction from which they came?

Would you write "I-1" and designate what that is, and "I-2" and "I-3" respectively?

(Testimony of George R. Cooley.)

(Witness writes on Defendants' Exhibit A-1).

A. I cannot put the location of the private [199] floodlights that were used at the shopping center. I don't know exactly where they were.

Q. Can you tell the general direction from which they came?

A. They were some place in the vicinity of the shopping center. I couldn't specify as to just where they were, because I didn't make a memorandum.

Q. With that qualification, will you indicate the general direction from which it came, by the word "I" and write the word "General" after that?

A. Yes.

(Writing on Defendants' Exhibit A-1.)

Q. Mr. Cooley, by what method did you examine the amount of illumination in that area?

A. By a foot candle meter.

Q. What is that?

A. An instrument for measuring light.

Q. And where did you take those measurements precisely?

A. At the site of the accident.

Q. Well, will you indicate on Exhibit A-1 the place or places where you made measurements, if that is shown on A-1?

A. Well, I can indicate where I made measurements, by making a little cross. [200]

Q. That would be fine.

A. But I made many measurements all around the area.

Q. And you have indicated by a cross there is

(Testimony of George R. Cooley.)

places in that area where you made those measurements? A. Yes.

Q. Mr. Cooley, at what level was the light measured? A. On the sidewalk.

Q. What were your findings?

A. The general area where the accident occurred was two one-hundredths of a foot candle.

Q. On the sidewalk surface?

A. On the sidewalk surface.

The Court: Is there another way of conveying that idea, to put after the word "candle" the word "power" — two one-hundredths of a foot candle power of light?

The Witness: Yes, sir.

The Court: Now, Mr. Bateman, you may proceed.

Q. (By Mr. Bateman): Mr. Cooley, was there some variation in the amount of light? [201]

A. Not in the immediate vicinity of where the accident was.

Q. Can you indicate on the drawing opposite the crosses that you have marked where measurements were made, the amount of the light at those respective places?

(Witness writes on Defendants' Exhibit A-1.)

Q. The figures that you have placed indicate two hundredths. That designates two one-hundredths of a foot?

A. Two one-hundredths of a foot candle power.

Q. Mr. Cooley, the measurements you have made,

(Testimony of George R. Cooley.)

what sort of a surface is that—a horizontal surface, or a vertical surface?

A. A horizontal surface.

Q. Did you measure, or did you not, the amount of light passed by a vertical surface at those places?

A. Yes.

Q. What was your finding in that respect?

A. Six one-hundredths of a foot candle.

Q. That would be the amount of light cast upon a vertical surface?

A. On a vertical stake which we placed in the ground. [202]

Q. Along opposite the various places?

A. Along opposite the place where the accident happened.

Q. And in several places along there?

A. And in several places in that vicinity, yes.

Q. From your examination and measurement of the light, did you form any opinion as to the adequacy of the light in that area.

A. It was normal street lighting.

Excuse me. I will change that. Normal sidewalk lighting.

Q. Mr. Cooley, did you make any measurements of the amount of light in any other places?

A. I made a number of measurements in different places in Seattle.

Q. What findings did you make in that respect, and will you designate in each instance where the measurement was made?

(Testimony of George R. Cooley.)

Mr. Guimont: I am going to object to this, your Honor. I think it is immaterial.

The Court: Try to further qualify the witness.

Q. (By Mr. Bateman): What was the purpose of making these [203] additional measurements of the lights?

A. To compare it with the light at the point of this accident.

The Court: Do you still object?

Mr. Guimont: I do object.

The Court: Well, I think the Court should sustain the objection for the same reason you wouldn't admit photographs over objection of places other than the specific place in question under conditions similar to those at the time of the accident.

Mr. Bateman: May it please the Court, we can further qualify the matter, your Honor, by showing the times when these measurements were made, and the manner in which these measurements were taken, if that is the reason for the Court's sustaining the objection.

I might add, and will perhaps save the Court's time that our purpose of course is to show by comparison the amounts of light available at different places within the City of Seattle, for the purpose of showing that the lighting at the place of the accident was adequate, was normal, was comparable and greater than that in numerous other places.

The Court: The Court sustains the objection on the same basis as objections to anything [204] ex-

(Testimony of George R. Cooley.)

cept actually what occurred in the facts material to the litigation in any case.

A photograph is manufactured evidence, unless possibly in some theoretical situation of a photograph of a so-called photo finish situation, where some action or something was taking place at a given moment, and there happened to be a photograph made of it which caught the action and reproduced it at a certain moment material, but ordinarily a photograph is a manufactured bit of physical evidence, and it is never admissible as a right in any case.

Sometimes in case like this where you have a photograph which is proved by authenticating evidence to be a reasonable and accurate reproduction of the physical facts, and the conditions existing, actually existing, at the moment material to the litigation, then judicial practice has approved, under limited circumstances, the receiving in evidence of such photographs, but it is very limited.

The objection is sustained.

Mr. Bateman: Exception, if the Court please.

The Court: The exception is allowed.

Mr. Bateman: And we would like to make the following offer of proof: That by this testimony, we offer to prove that the lighting in the area where this [205] accident occurred was greater and exceeded that in common public sidewalks and streets throughout various places in the City of Seattle, measurements having been taken under the same

(Testimony of George R. Cooley.)

conditions as existed at the time of the accident in question.

The Court: Is there any objection to the offer?

Mr. Guimont: I object to the offer.

The Court: The objection is sustained.

Q. (By Mr. Bateman): Mr. Cooley, are you acquainted with general standards of street lighting?

A. Yes, sir.

Q. Did you determine from the measurements taken of the amount of light at the places indicated on your drawing where you made these measurements, how that compared with general standards of sidewalk lighting?

A. It was normal sidewalk lighting.

Q. Did you make on February 26th, at the time you have testified to, any tests of visual activity possible at the scene where you made these measurements?

A. Yes.

Q. What, if any, such test did you make?

A. The notes that I have in my memorandum book [207] were made with the light that existed there. I was able to read a newspaper, and I was able to easily see a piece of wire which you laid on the sidewalk.

Q. Where was the newspaper placed?

A. I held it in my hands.

Q. And at what level, were you?

A. Down close to the sidewalk, within a few inches of the sidewalk.

Mr. Bateman: You may inquire.

(Testimony of George R. Cooley.)

Cross Examination

Q. (By Mr. Guimont): How, Mr. Cooley, did you determine in that area that there was no natural light?

A. Personal observation, looking at the sky.

Q. Were the lights turned off to make that?

A. No. The artificial light was on, but there was no sky light.

Q. And the lights, though, that were on were on in the Project?

A. I didn't understand that question.

Q. There were lights on all during the time that you were there? A. Yes.

Q. In the Project? A. Yes. [208]

Q. Was there any light emanating from the apartment windows? A. No.

Q. If there had been, would that affect the computation of candle power?

A. It would have made it higher.

Q. It would have made it higher. You know what wattage there was in any of the lights that were on?

A. No, I do not.

Q. Do you know what wattage was contained in the lights, if they were on, on November 5, 1952?

A. The original installation was 2,500 lumen lamps. That is about 250 candle power.

That depreciates or goes down with age.

Q. And how fast does that go down?

A. In 6,000 hours it will go down to about 40 per cent. In 6,000 hours of burning, it will go down to about 40 per cent of its initial light.

(Testimony of George R. Cooley.)

Q. Would the candle power of light on a given area vary in accordance with the voltage or wattage of the globes that were used in the light fixtures?

A. It would vary with the wattage, yes.

Q. Would you have any knowledge at all of what that wattage may have been on November 5, 1952? [209]

A. I only know what I laid out on the plans, and it was afterwards accepted as being according to the plans, and those are 2,500 lumen street lights.

Q. Was that the street lights, the 2,500——?

A. 2,500 lumen, yes. That is about 250 candle power.

Q. That was placed in the street lights?

A. Those are in the street lights, yes.

Q. Do you know what was the voltage or wattage of any of the globes prescribed which may have been placed on buildings, on the outside of buildings? A. I don't know.

Q. You don't know what that wattage was?

A. I don't know what that wattage was.

Q. I note on Exhibit A-1 that you placed two lights apparently in the vicinity of the shopping center? A. Yes, sir.

Q. Would those lights cast a shadow on the sidewalk where the pole is placed in the parking strip area?

A. The only lights under consideration were those that were visible from that point.

Q. Did you take any measurement of the light,

(Testimony of George R. Cooley.)

candlepower, on the walk in the shadow cast by the [210] telephone pole?

A. No. We avoided that entirely, didn't take any measurements there.

Q. Do you recall at this time whether there was any shadow there?

A. There was slight shadow there from the floodlights on the building, but that didn't shine on the sidewalk.

Q. Now, the floodlights from the building didn't shine on the sidewalk?

A. No. The floodlight did shine on the sidewalk. The shadow of the pole did not.

Q. The shadow of the pole did not?

A. No.

Q. Now, was there any shadow cast by a fence that was placed on an area west of the telephone pole?

A. Yes, but I didn't take measurements in that shadow.

Q. Did a sand box that was, also, west of the telephone pole and across the walk, did that sand box that stood some three or four feet high cast any shadow? A. No.

Q. Did you take any measurements of candlepower in that shadow? A. No. [211]

Q. Well, did it cast a shadow?

A. I don't think it did.

Q. Now, I thought, Mr. Cooley, that there were three crosses that you failed to place in the candlepower figure opposite on A-1.

(Testimony of George R. Cooley.)

Would you please indicate what your opinion is, if you have one, of the candlepower of those three crosses? They are west of the telephone pole.

The Court: When you answer this question, may we be interrupted for a moment?

A. I have marked seven places where I took measurements, and I have seven measurements. And I don't see any other cross. There is one cross up there which I didn't make any measurement from because it was in the shadow of the fence or was obstructed in such a way that it didn't give a true indication.

The Court: At this moment we will take a ten-minute recess.

(Recess.)

The Court: You may resume the interrogation of the witness.

Mr. Guimont: Thank you, your Honor.

Q. (By Mr. Guimont): Mr. Cooley, west of the telephone pole on Exhibit No. A-1, you made three other little checks, did [212] you not?

A. Yes.

Q. Over the sidewalk area? A. Yes.

Q. Did you take any measurements of the candlepower there?

A. I took measurements but I didn't make a memo on it, because I thought they were immaterial, not being close to where I was told the accident happened.

Q. Now, did you notice any shadow east of that telephone pole across the walk?

(Testimony of George R. Cooley.)

A. There was further back than where the accident happened.

Q. Would you mark on Exhibit A-1 with a blue pencil and a straight line crossing the sidewalk, if that is where it should be, where the termination of that shadow was?

A. (Drawing) That is as near as I remember. I didn't take any measurement at the time, but I think that where I made the mark is approximately right.

Q. Would the candlepower on the walk be diminished by a shadow of a person walking on the walk, if any?

A. Yes. Their shadow would very likely fall [213] on the walk, but the light comes from so many directions that if there was any shadow that the place would be very slight.

Q. How far did the light travel from the shopping center bulbs?

The Witness: What is the scale?

Mr. Bateman: The scale is on the drawing, Mr. Cooley.

The Court: Which drawing are you looking at, Mr. Cooley?

A. I see the scale here says one inch to ten feet. I would say about 150 feet.

Q. (By Mr. Guimont): Now, you don't know, of course, whether the lights were even on on November 5, 1952, do you, Mr. Cooley?

A. No, I do not.

(Testimony of George R. Cooley.)

Q. That candlepower would be varied by the strength of the globe? A. By what?

Q. The candlepower you found on the evening of February 26th, 1954, would be varied by the strength of the candlepower of the globe, is that right? A. That is right.

Mr. Guimont: That is all. [214]

Redirect Examination

Q. (By Mr. Bateman): Mr. Cooley, do you have any recollection of the measurements of light that were made in the places checked there west of the telephone pole?

A. Yes, I have. I remember them. I didn't write them down at the time.

Q. What were they?

A. From two and one-half to three one-hundredths of a foot candle.

Q. How does that compare with the measurements at the other places that you made?

A. The other place was two one-hundredths of a foot candle.

Q. Then the amount of light was greater in the area west of the telephone pole?

A. Yes.

Q. Would you indicate on the drawing those measurements?

(Witness draws on Defendants' Exhibit A-1.)

Q. Will you also indicate on Exhibit A-1 the candlepower from the measurement of light on a vertical surface that you made there by placing the

(Testimony of George R. Cooley.)

amount of the candlepower according to your measurement with a small "V" after it to indicate "vertical"? [215]

(Witness draws on Defendants' Exhibit A-1.)

Q. You have indicated, Mr. Cooley, a rather large "V" at point zero six?

A. That is six one-hundredths of a foot candle.

Q. Do you intend to indicate that was the measurement over that entire area?

A. No. That is just on a post that was stuck in the ground there.

Q. Did you make more than one measurement of that vertical candle?

A. Yes, we took it from several different directions.

Q. And from several different places, or just the one place?

A. Just the one place around the stick.

Q. Mr. Cooley, was the measurement of light on the vertical surface of the post taken from just one direction, or was it taken from several directions?

A. We took it from several directions.

Q. Do you recall how many different directions?

A. I think we took it from three directions, facing each one of those sources of light.

Q. You have marked a blue line across the sidewalk area close to the place where you put your initials. What was that blue line to indicate?

A. That was the shadow of the fence east of it.

Q. And what, if anything, do you know about the intensity of that shadow?

(Testimony of George R. Cooley.)

A. Well, we couldn't get a reading on the meter.

Q. Were there any other shadows in that vicinity on the sidewalk area?

A. No. There were too many sources of light.

Q. Pardon me?

A. There were too many different sources of light to produce any distinct shadow.

Q. What effect, if any, do the many sources of light have on the shadow?

A. There wouldn't be any, or very little.

Mr. Bateman: No further questions.

Recross Examination

Q. (By Mr. Guimont:) Did you find any variation of intensity in the vertical readings as reflected from the different sources of light that you were testing?

A. When you take a vertical, you could only take from one source. The electric eye only takes light from one source, one direction. [217]

Q. That is right. That is what I am talking about.

When you took the reading from the two lights that are in the shopping area, was there any variation in intensity of that over the light from one of the other sources?

A. No. It was all the same, as near as I could read on the meter.

Q. Now, would you refer again to A-1 and indicate on the sidewalk, by shading the area, the area

(Testimony of George R. Cooley.)

that was shaded by the telephone pole that you testified to?

A. It would only just be at the base, close to the base of the pole, because the lights from the other sources would obliterate a shadow.

Q. Now, would you put whatever shadow on you feel was there that you recall?

A. Well, no, I can't. I don't think there would be any shadow on that, that I could tell from here would be there.

Q. You didn't measure anything in that shadow?

A. No. I didn't measure anything in the shadow.

Mr. Guimont: That is all.

Mr. Bateman: No further questions. [218]

The Court: You may step down, Mr. Cooley.

(Witness excused)

The Court: Call the next witness.

Mr. Bateman: May this witness be excused, Your Honor.

The Court: Any objection?

Mr. Guimont: No objection.

The Court: You may be excused, Mr. Cooley, and go on about your own business, if that is your wish.

Mr. Bateman: Thank you. I would like to call Mr. Cvetikovs.

NICKOLAS CVETIKOV

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you please state your name, and I am going to ask you to spell it?

A. Nickolas Cvetikovs. Nickolas, N-i-c-k-o-l-a-s, Cvetikovs, C-v-e-t-i-k-o-v-s (spelling).

Q. Where is your residence, Mr. Cvetikovs?

A. 1110-139th Southwest.

Q. And is that in the Lake Burien Apartments Project? [219]

A. That is in the Lake Burien Apartment House.

Q. How long have you lived there?

A. Since December, 1950.

Q. What is your occupation?

A. Well, I am night watchman and utility maintenance man.

Q. Where?

A. In Lake Burien Heights Apartments.

Q. By whom are you employed?

A. By Lake Burien Heights Apartments.

The Court: By the United States of America through that concern?

The Witness: That is right.

The Court: Proceed.

Q. How long have you been so employed?

A. For about three years, more than three years.

(Testimony of Nicolas Cvetikovs.)

The Court: How long have you lived in this country?

The Witness: Just the same.

Q. Who is your immediate superior?

A. Mr. Brydon, Mr. James Brydon.

Q. You were employed there then on November 5, and during the months of October and November of 1952? [220]

A. Yes, I was.

Q. In the same capacity?

A. Just right.

Q. What are your duties, Mr. Cvetikovs?

A. Well, my duties are to take emergency calls and go to the apartments and take care of emergencies which occur during the night when nobody is on there from the staff, and of course, I make my rounds, and take care of everything what seems to be wrong.

Q. What are your hours of work?

A. I work from six o'clock every night.

Q. And that was the situation during the month of November, 1952?

A. Yes, it was the situation then.

Q. Do you have anything to do with the outside lighting on the project?

A. Yes, I do. I reset the clocks.

Q. What do you mean by that?

A. Well, the outside lighting has to go on and off at certain times, and my duty is to set the clocks so that the lights come on when desired.

Q. Well, now, what clocks are these?

(Testimony of Nicolas Cvetikovs.)

A. These are the switch clocks which switch on the lights, the outside lights and the porch lights.

Q. By the "outside lights", what lights do you [221] refer to?

A. We call them area lights. They are big lamps suspended or fastened to the building, not to all the buildings, but to some of them.

Q. Showing you Defendants' Exhibits A-4 and A-10, I will ask you to designate whether or not there are any of those area lights shown in those pictures.

A. Yes. This is what we mean by area lights.

Q. Is that what you mean by area lights?

A. Yes.

Q. Will you refer to Exhibit—the one that shows the close-up picture of one of those lights?

What number is that?

A. That is A-4.

Q. And from the position that that light is shown to be situated, I will ask you, is that the place where all of these lights are attached to the respective buildings?

A. Well, it is approximately the place.

Q. Where is that? Approximately how high above the ground is that? Do you know?

A. Well, I just wouldn't imagine—maybe twenty feet, or something.

Q. Referring you to the other picture you have [222] there. I believe it is A-10. Are you familiar with the area shown in that picture?

A. Yes, I am.

(Testimony of Nicolas Cvetikovs.)

Mr. Bateman: Would you please show the witness Exhibit A-1?

(Defendants' Exhibit A-1 handed to the witness.)

Q. Can you, by referring to Exhibit A-1, indicate where on Exhibit A-1 the light shown in Exhibit A-1 is located?

A. Yes, I can.

Q. Would you indicate that light with a red pencil and a circle and write "L" in it, or something? A. Yes. (Writing)

Q. Now, that light you have indicated is one of the area lights? A. Yes.

Q. And it is part of your duties to set the time clocks that bring those on? A. That is right.

Q. What, if any, other time clocks do you set, time switches?

A. Well, in every building there is such a time switch or time clock, and it operates all the lamps in the building. [223]

Q. Is that including this area light?

A. Including this area light.

Q. Now, how do you set those?

A. Well, the switch is located in the basement, and it is a box, and you just open it up and there are two screws, one screw for time on, and the other screw for time off. By changing the position of these two screws, you regulate the time when the lamps come on and off.

Q. And what is your practice, and what was your practice, in November of 1952, with respect to

(Testimony of Nicolas Cvetikovs.)

the regulating of the time the lights were to come on?

A. Well, general practice was to set the time switches so that the area and all of the lamps come on just after sunset.

Q. And is that the manner in which you performed that duty in November of 1952 and since that time? A. Well, so I believe.

Q. I will ask you whether or not you have ever known since you have been there, these time switches to fail?

A. Not in this particular building.

Q. In other words, when they are set, the [224] lights come on at that time?

A. That is right.

May I correct? Except when the power is off.

Q. Except in event of a power failure?

A. That is right.

Q. Do you have any duties or have you had any duties with respect to the fences which were constructed around the lawn areas when they were planted out there?

A. Well, whenever I was around, if I saw a fence which was not in order, I put the wire aside or fixed it as well as I could. I mean, I would just put it in order to prevent disaster.

Q. Going back again to the question of the lights, did you have anything to do with the street lights in the area as distinguished from these area lights on the buildings? A. No.

(Testimony of Nicolas Cvetikovs.)

Q. Do you know how they were regulated or how they were turned on and off?

A. So far as I know, by the same means, but the City Light took care of it.

Q. Did you or did you not coordinate your lights in any way with the street lights? [225]

A. Well, approximately, yes.

Q. Were they set to come on or were they not before it became dark? A. Yes, they were.

Mr. Bateman: I have no further questions.

Cross Examination

Q. (By Mr. Guimont): Did you say that the switches for the regulation of these area lights are in each building? A. That is right.

Q. And do you recall on the evening of November 5, 1952, going to the building where that light is shown, and turning that switch on or regulating that switch?

A. Well, the switches work automatically. Once set, they go on indefinitely until the power is off or you reset them.

Q. Power going off will stop the mechanism?

A. That is right.

Q. Do you recall when it was on November 5, 1952, that you set that switch?

A. Well, I wouldn't recall the date.

Q. Would it have been a week before?

A. Well, my system, if I can say——

Q. What was your system? [226]

(Testimony of Nicolas Cvetikovs.)

A. To reset them every fortnight, every second week.

Q. Every two weeks? A. That is right.

Q. And you don't recall when you set this switch? A. No, sir. I wouldn't.

The Court: Have you had a lot of experience in your earlier life in operating and setting up this kind of electrical system or systems?

The Witness: I would say "yes".

The Court: Did you do that kind of work in your native country? The Witness: No.

The Court: There was recently in a publicly distributed periodical in this country, an article saying that we Americans are not very kind to foreigners who come here, were not very hospitable to them. I guess you have not found that, have you?

The Witness: I have found it just the opposite.

The Court: You are very lucky getting a job for the United States soon after arrival.

The Witness: Sure.

The Court: Maybe a lot of native born [227] people would like to get some ideas from you as to how to get some ideas from you as to how to get employed by the United States. You might have a good job instructing them how to do that. I think that your example would be a wonderfully strong refutation of that article which appeared in the Literary Digest some months ago to the effect that Americans have not been kind to foreigners. I do not think that is true, and I think your experience is to the contrary.

(Testimony of Nicolas Cvetikovs.)

The Witness: I don't think it is true.

The Court: I think that your experience shows that in America everybody has an equal chance.

The Witness: That is right.

The Court: It makes one wonder if the conditions were reversed, do you suppose the Government in your native land would employ an American to work for the Government the next day after his arrival there?

The Witness: I don't know.

The Court: You may proceed.

The Witness: If he was an American, probably "yes".

Q. (By Mr. Guimont): Do you know if November 5, 1952, you were setting up the switch to come on each evening earlier or [228] later?

A. Well, of course, come on later—earlier, excuse me.

Q. Then, I take it that when you did set the switch at whatever time you did set it, you set it so that on successive days during the fortnight it would be coming on earlier each day?

A. That is right.

Q. Do you know what size bulbs are used in those area lights that you pointed out in A-4 and A-10? A. Yes. Usually 300 watt.

Q. And do you know whether the bulb was on on the evening of November 5, 1952?

A. I wouldn't know.

Q. Now, you came on at six o'clock each evening at that time? A. That is right.

(Testimony of Nicolas Cvetikovs.)

Q. And after you came on, was it your duty to set this switch every fortnight to accommodate the hours of sunset? A. That is right.

Q. Do you recall approximately when sunset was on November 5?

A. Well, I don't know exactly. It was mentioned [229] about 4:30 or something.

Q. You didn't have as part of your duties to repair barricades placed around the lawn areas, did you?

A. Well, whenever I made my rounds, and I found the barricades down, either I put them away on the sidewalk or I just repaired, as far as I could, with my pair of pliers.

Q. Do you recall having on occasions during the fall of 1952 and prior to November 5 of 1952 of setting aside these barricades that had fallen down or were loose? A. Yes, sometimes.

Q. And do you recall where those barricades had fallen or had come apart?

A. Well, I wouldn't recall the exact site.

Q. How was it that you had occasion to observe those barricades being down, or was it in the daylight or was it in the evening?

A. Well, I usually work in the evening, and so I came on duty at six. This time, it was dark.

Q. Now, have you walked into any barricades on the sidewalks that had come down, you, yourself?

A. Well, no.

Q. Did you receive in your duties any [230]

(Testimony of Nicolas Cvetikovs.)

complaints from tenants with reference to barricades being down? A. I wouldn't recall.

Q. Do you know of anybody that was injured by falling over those barricades?

A. Even I didn't know that the plaintiff had been injured.

Q. You didn't even know the plaintiff had been injured? A. No.

The Court: Mr. Guimont, may I interrupt you here? Would it be convenient for the witness to be here at five minutes before two?

The Witness: Yes.

The Court: Can Counsel, also?

Mr. Guimont: Yes.

The Court: Then I ask you to be here at five minutes before two o'clock P. M. The Court will be in recess until that time.

(At 12:00 o'clock noon, Thursday, March 11, 1954, proceedings recessed until 1:55 o'clock p.m. Thursday, March 11, 1954.) [231]

Seattle, Wash., March 11, 1954, 1:55 o'clock p.m.

The Court: You may proceed. The witness will resume the stand for further interrogation.

Q. (By Mr. Guimont): You are acquainted with the type of lights that are placed in the area, the area lights you speak of? A. Yes, I am.

Q. Those area lights, are they called floodlights?

A. No.

Q. Are they a shaded lamp? That is, do they have a lampshade around them?

(Testimony of Nicolas Cvetikovs.)

A. That is right. They have a glass lampshade partially covered by some black stuff, or maybe a hood.

Q. Are there any floodlamps around the area?

A. Well, the only floodlamps you can see from there are at the shopping center.

Q. And about how far away are they?

A. Well, it is difficult to judge. Maybe 800 feet or maybe less than that. A map should [232] indicate the distance.

Q. Are you familiar with the area where the apartment was that Mr. and Mrs. Dooley lived in in November of 1952?

A. Well, I don't know. If you tell me the apartment number and the house number, I will tell you.

Q. It was 13710-12th Southwest, and Apartment 101.

A. Yes, I do.

Q. Are you familiar with the point that has been marked on Exhibit No. A-1 and where there are several little crosses marked on the sidewalk area?

A. Yes, I am familiar.

Q. Is there a light west of that area, that is placed on a building?

A. Yes, that is the light about which we are talking now.

Q. Is that the light? As it falls on the sidewalk area where those marks are, is that obscured by the fence—there is a fence, a picket fence of some 7 or 8 feet, is there not?

A. Yes. There is one.

Q. Does that light have any shadow cast? Does that fence cast any shadow over the walk?

(Testimony of Nicolas Cvetikovs.)

A. I couldn't answer you that. [233]

Q. You don't know?

A. I don't remember. I couldn't tell.

Q. Would you know how high on the building that lamp is?

A. Well, we have the distance, the head of the lamp, and the distance between the point of the lamp and the fence, or we can place a direct line and have the shadow.

Q. It would cast a shadow, do you think, that light?

Mr. Bateman: I think the witness has already answered that. A. Maybe, maybe not.

The Court: The objection is overruled.

Mr. Bateman: Would you repeat the witness' answer?

(Last answer read by the reporter.)

Q. (By Mr. Guimont): Now, calling your attention particularly to that area, did you ever have occasion prior to November 5, 1952, of picking up any wires off the sidewalk?

A. Possibly might have, might be, I don't know.

Q. About how often did you find yourself picking [234] up wires that had fallen across the sidewalk?

A. You mean in the general area?

Q. Yes, in that general area.

A. In this general area?

Q. Yes.

A. I just wouldn't be able to tell you the number. It would be maybe a couple of times; maybe more.

(Testimony of Nicolas Cvetikovs.)

Q. Did you ever receive any direct orders or instructions to make any repairs to the wire barricades in the area?

A. No. I always, whenever I passed and I saw it, I removed it, because it was an obstruction which had to be removed.

Mr. Guimont: I believe that will be all.

Redirect Examination

Q. (My Mr. Bateman): What were your instructions with respect to the setting of the lights to come on?

By the "lights", I mean the area lights and the front lights of the building, to come on in the evening?

A. Well, the general instructions were to set them so that the lights came on just after the sun set.

Q. By "just after"— [235]

A. Well, I mean between sunset and maybe ten or fifteen minutes after.

Q. And what observations, if any, have you made with respect to the time when the street lights in the area came on as compared with your area lights?

A. Well, there would be maybe a few minutes' difference.

Q. By "a few minutes", how many?

A. Well, up to five, or up to ten. It would depend on the time.

Mr. Bateman: No further questions.

(Testimony of Nicolas Cvetikovs.)

The Court: You may step down.

(Witness excused)

The Court: Call the next witness.

Mr. Bateman: I would like to call Mr. George Yamada.

GEORGE YAMADA

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you state your name, please? A. George Yamada.

The Court: Will you please repeat that [236] and spell it?

The Witness: Yamada,—Y-a-m-a-d-a (spelling).

The Court: You may inquire.

Q. (By Mr. Bateman): Where do you live, Mr. Yamada?

A. Route 4, Box 918, in Kent.

Q. What is your occupation?

A. I am a maintenance gardener at Lake Burien Heights.

Q. How long have you been so employed?

A. With Lake Burien Heights for approximately four years.

Q. You were employed there during November of 1952? A. Yes, I was.

Q. And for some time prior to that?

A. Yes, I was.

(Testimony of George Yamada.)

Q. What are your duties as maintenance gardener?

A. Duties are to line up the work force, their work program for each day, see that those work programs are carried out.

Q. Have you been in gardening work for some time? [237] A. Yes, I have.

Q. For how long? A. Seven years.

Q. Where did you work prior to that?

A. Prior to Lake Burien Heights, I was employed by Seattle Landscape, Incorporated.

Q. For a period of three years?

A. Three years, and prior to that time, I served with the Armed Forces.

Q. Are you acquainted with the lawn re-establishment program that was carried on at the Lake Burien Heights during 1952?

A. Yes, I am.

Q. What connection, if any, did you have with that?

A. I was on loan from the management to the Federal Housing Administration as an assistant to the architectural inspector of that office.

Q. Of what office?

A. Federal Housing Administration.

Q. And as such, what did you do?

A. It was my duty to see that the contractor there carried out his work program, according to specifications.

Q. And who was the contractor? [238]

A. Miller & Hansen.

(Testimony of George Yamada.)

Q. And what type of work are they in?

A. They are landscape gardeners.

Q. And what was the nature of the contract that they were to perform?

A. The nature of that contract was to renovate lawn areas, that is re-seed, and also the installation of new plants.

Q. Shrubbery?

A. Shrubbery, trees, et cetera.

Q. Do you know approximately how much area was involved in their lawn re-seeding program?

A. Approximately 130,000 square feet.

Q. And was that all at the Lake Burien Apartment House site?

A. Yes, it was.

Q. Do you know the cost of that installation or of that work?

A. I believe their contract was based on a figure of some eight cents a square foot.

Q. Have you had occasion to compute what that total figure was?

A. No, I haven't.

Q. What was the practice, if any, with respect to the lawn areas as they were re-seeded by Miller & Hansen? [239]

A. As the lawn areas were re-seeded, they put up a barricade, a fence, to divert people away from the new seedlings.

Q. By the way, when was this work carried out?

A. This program was carried on starting in May of 1952, and carried through the succeeding months of that year.

(Testimony of George Yamada.)

Q. What was the nature of the barricades which were put up?

A. I don't quite understand the question.

Q. Can you describe the fences or barricades that you referred to as having been placed around the newly seeded areas?

A. These fences were approximately two feet high off the ground, with a single wire placed on it, generally stapled.

Q. And what was the nature of the uprights?

A. Uprights were either 2x4's or 2x2's.

Q. And how far apart were they, if there is any general practice on that?

A. That depended on the area. I don't believe that the stakes were no more than about eight foot apart.

Q. And where were they placed? [240]

A. They were placed away from the sidewalk in the new lawn area.

Q. How far? Can you locate more exactly?

A. Well, I would judge that they were in the new area about three to five inches.

Q. Calling your attention to Exhibit A-1, which I believe is on the desk before you, are you able to recognize the portion of the Lake Burien Heights Project or Apartment House Project site that that represents?

A. Yes.

Q. And are you familiar with the scale that is indicated on the drawing?

A. Yes, I am.

(Testimony of George Yamada.)

Mr. Bateman: Mr. Bailiff, will you give those pictures to the witness, please?

(Bailiff hands pictures to the witness.)

Q. The Bailiff has handed you two exhibits. Will you indicate the numbers of those?

A. I have A-11 and A-12.

Q. Those are pictures of the Burien Apartment House Project area showing the grounds. Have you seen those before? A. Yes.

Q. Did you take them? [241]

A. Yes. I took these pictures.

Q. Do you know when they were taken?

A. This was taken approximately the spring of 1953.

Q. That would be a year ago?

A. A year ago.

Q. A year ago this spring? A. Yes.

Q. Is that the approximate appearance of the ground, or was it at that time?

A. Yes, it is.

Q. Do those pictures clearly represent the work that was accomplished by the re-establishment program with respect to these lawns and plantings in the area? A. Yes.

Q. Showing you Plaintiffs' exhibits, would you indicate the numbers of the pictures which you have just been handed?

A. I have A-3, A-9, A-8, A-7, A-5, A-6, A-4, and A-10.

Q. Would you examine those, please, and tell

(Testimony of George Yamada.)

me whether or not you recognize the area of the Lake Burien Project at which they were taken?

A. Yes, I recognize them. [242]

Q. I will ask you whether or not those pictures are taken of any particular area on the Exhibit A-1 before you?

A. Yes. These are identical. They are of that area.

Mr. Bateman: Would you show the witness, please, Mr. Bailiff, Exhibit A-2, which is on the Clerk's desk?

(Defendants' Exhibit A-2 handed to the witness.)

Q. Mr. Yamada, Exhibit A-2 is a further enlarged drawing of the area, the whole of which is shown on A-1? A. Yes.

Q. Can you orient yourself to that exhibit and drawing? A. Yes, I can.

Q. You will note that the scale on this last drawing you have checked is one inch equals two feet?

A. Yes.

Q. Are you acquainted with the nature of the barricade that was placed around the lawn area indicated on Exhibit A-2? A. Yes.

Q. Will you mark on Exhibit A-2 the portion [243] which is lawn area?

A. The portion which is lawn area?

Q. Which was part of the newly seeded area.

The Court: Do so, with red lines.

(Witness draws on exhibit.)

Q. How have you indicated?

(Testimony of George Yamada.)

A. I crossed it with the red pencil.

Q. That newly planted area extended on out along the lines enclosing the space you have indicated, did it not? A. Yes.

Q. Do you recall the placement and nature of the barricade, if any, which was placed around that area? A. At the present time, no.

Q. You have no recollection of that now?

A. I know that the fence was there, yes, but as to location, no.

Q. The exact location you cannot recall?

A. No.

Q. Incidentally, the pictures that you have referred to, Exhibits A-3 through A-9, are pictures of that same area, are they not?

A. Yes, they are.

Q. And are you acquainted with the general [244] practice of gardeners and landscape contractors, lawn planters, with respect to newly seeded lawn areas? A. Yes, I am.

Q. What, if anything, is the practice with respect to whether or not such areas are fenced?

A. Those areas which are newly seeded are generally fenced in.

Q. Do you know what, if any, reason there is for that?

A. To divert traffic away from these areas so that new seedlings will not be damaged.

Q. In your opinion, is that essential to protection of the area? A. Yes, it is.

Q. Are you acquainted with the practice with

(Testimony of George Yamada.)

respect to the nature of the fences or barricades that are put up around such areas?

A. The fences that are used are in general typical to what were installed at this particular place.

Q. Was there any program adopted by Miller-Hansen for the maintenance of these barricades?

A. Yes, there was.

Q. Are you acquainted with that program?

A. Yes, I am.

Q. What did it consist of? [245]

A. Every morning a man or two men were delegated from Miller & Hansen's work force to check their fences until such time that these lawns were accepted by the Federal Housing Administration.

Miller-Hansen sent their men out to check these fences and repair those that were damaged.

Q. And you state that was done as a matter of practice each morning?

A. Each morning, yes.

Q. Had these lawns been accepted by the Federal Housing Administration prior to November 5, 1952?

A. Yes, they were.

Q. Do you know when, or approximately when, they were accepted?

A. Approximately the first of July these lawns were accepted by the Federal Housing Administration.

Q. And what or who then fell heir to the maintenance of the lawn?

A. Lake Burien Heights, Incorporated.

Q. By "Lake Burien Heights, Incorporated",

(Testimony of George Yamada.)

do you mean the management of the Lake Burien Apartments?

A. The management of the apartments.

Q. By whom are you employed now? [246]

A. By Lake Burien Heights, Incorporated.

Q. And is that the management of the apartments? A. Yes.

Q. Is that one and the same as Carroll, Hedlund & Associates, Inc.? A. Yes.

Q. What, if any, maintenance program was followed with respect to maintenance of those barricades or fences around the seeded area after it was taken over by the project staff?

A. The identical program was carried out by the management. Each morning a man was delegated to check and repair those fences.

Q. Do you know who that man was?

A. Yes, I do.

Q. Who? A. Mr. Dykeman.

Q. Is he still employed at the project?

A. Yes, he is.

Q. Was there any other maintenance work with respect to those fences carried on?

A. Outside of the management?

Q. No. By the Lake Burien Project staff, the management staff.

A. It was a standing order with the work force [247] that at any time should there be discrepancies or things wrong on the outside or inside, that they be reported or repaired as they saw fit.

(Testimony of George Yamada.)

Q. Did that apply with respect to these barricades? A. Yes, it did.

Q. How many men did you have under you and working for you in your crew on or about November 5, 1952?

A. At the time I did not have charge of any men.

Q. What was your occupation at that time?

A. I was assistant to the architectural inspector for the Federal Housing Administration.

Q. You were still acting in that capacity on November 5? A. Yes.

Q. Do you know how many men there were on the outside maintenance force of the staff at that time?

A. No. I am not aware of that count.

Q. Mr. Yamada, what, if any, considerations determine how long such fences or barricades should be maintained?

A. Generally speaking, that is at the discretion of the owner. However, that is controlled by [248] the amount of traffic that is bound to come through, and the weather conditions.

Q. What effect does the amount of traffic have upon it?

A. The traffic has a tendency to wear certain lawn areas out.

Q. And do those restore themselves automatically?

A. Generally not. They have to be reseeded.

(Testimony of George Yamada.)

Q. What effect, if any, does the weather have upon the situation?

A. During wet weather, with your ground being saturated, the foot traffic has a tendency to scuff and dig out these areas more so than during summertime.

Q. In your opinion, was it reasonably necessary to maintain the barricades around the particular area indicated in the pictures and on A-2 and A-1 up to November 5 and thereafter? A. Yes.

Q. Do you know when those areas were seeded?

A. Those areas were seeded in June.

Q. Of that same year?

A. Of that year.

Q. Were you or were you not cognizant of any particular problem confronting the management with respect to the maintenance of these fences?

A. Well, I am aware of the fact that there was one man definitely, Mr. Dykeman, going around every morning to repair these fences.

Mr. Bateman: You may examine.

Cross Examination

Q. (By Mr. Guimont): In November of 1952, you were lining up the work program for workers?

A. No, not at that time.

Q. Oh, I understood that you were maintenance gardener in November of '52?

A. Not then. I was unknown to the inspector.

Q. I see. When did you cease your activities as

(Testimony of George Yamada.)

the one who lined up the work program for the men?

A. That ceased approximately in May of 1952.

Mr. Bateman: May it please the Court, I think there is confusion there. He hasn't ceased his job as maintenance gardener.

Q. (By Mr. Guimont): Well, in May, you ceased being the man who lined up the work schedule for the other gardeners?

A. May of that year, yes.

Q. Of '52? A. Yes.

Q. Did you ever resume that duty? [250]

A. Yes.

Q. When did you resume the duty?

A. October of 1953.

Q. Now, you say that until July 1 of '52 there were two men assigned by the contractors to maintain and repair the fences?

A. One or two men, yes.

Q. And then, after that, you say that the Government took over and only assigned one man to it? A. Yes.

Q. Was there a lessening of difficulty with the barricades after July 1?

A. No. That wasn't the reason for one man.

I merely mention one or two men by the contractor because he may have had a slack period there for additional men, and he might have sent one along to check these fences.

Q. Now, you speak of management's problem in maintaining these barricades.

(Testimony of George Yamada.)

A. I don't recall specially commenting on management's problem.

A. Well, management did have a problem, did [251] they not?

A. Management looked after the fences, yes.

Q. And what was the problem that they were having with respect to these fences?

A. The children at times would go out and cut the fences, cut the wires, or they would swing on these fences and loosen them.

Q. Now, did you receive complaints of the fences being down from time to time?

A. No, I did not.

Q. Did you at any time when you were assigning the work crew—I mean work to the crew—this was before May of '52—did you at any time receive complaints that fences had been torn down or that the barricades were askew the sidewalks?

A. Prior to May of '52, the contract hadn't started yet, and there was no seeding.

Q. There wasn't any seeding? A. No.

Q. Did they have barricades prior to May of '52? A. No, they did not.

Q. It was after that that you ceased being the maintenance man who assigned work to the grounds crew? A. Yes.

Q. Who, after July 1, 1952, had charge of the [252] assigning of work to the maintenance crew?

A. Mr. Suder.

Q. Mr. Suder? A. Yes.

Q. And do you know of your own knowledge

(Testimony of George Yamada.)

whether or not any complaints were received by Mr. Suder, or by you, of fence barricades having come down?

A. I have no knowledge whatsoever.

Q. Did you receive any complaints?

A. I did not.

Q. In your travelling about the grounds, did you see any of the barricades torn down?

A. Yes.

Q. And when did you see those barricades torn down? A. In the mornings.

Q. In the mornings? A. Yes.

Q. Was that every morning?

A. Not every morning, no.

Q. Was it often? A. No.

Q. Was it once or twice a week? A. Yes.

Q. And did you yourself ever go out and make [253] any repairs to the fences? A. Yes.

Q. Was there any thought given to making wooden fences or some other type of fence that wouldn't be torn down so easily?

A. No. The cost would be prohibitive.

Q. Did you ever hear of reports of injuries being received by people resulting to them from these fences being torn down?

A. No, I haven't.

Q. Did you ever notice the barricades in the area indicated on A-1 that was barricading that shaded area that you cross-hatched. Did you ever notice those barricades? A. Yes.

Q. And did you ever see them down?

(Testimony of George Yamada.)

A. No.

Q. How often did you go by that area?

A. That is hard to judge. We were doing an extensive amount of planting. The contractors were doing an extensive amount of planting at that time, and I couldn't tell you how often I went through that area.

Q. Did you yourself ever make the inspections of the barricades? [254]

A. Generally speaking, yes. That is prior to July 1.

The Court: What year?

The Witness: 1952.

Q. And thereafter, did Mr. Dykeman make that inspection? A. Yes.

Q. What did that inspection entail? A walk clear around the project area?

A. Yes, of all areas.

Q. And how long would it take to make that inspection trip? A. About an hour.

Q. If the lawns were accepted by July 1st, does that mean that they had sprouted up?

A. They had sprouted up, yes.

Q. And the turf was that formed?

A. In one sense, yes.

Q. What, then, is the reason for the continuation of these barricades after that date?

A. To divert traffic away so that these lawns would not be scuffed out again. The seed would not arise where they would have to be reseeded.

Q. You took pictures in the spring of 1953?

(Testimony of George Yamada.)

A. Yes. [255]

Q. And in some of those pictures, there are still wire barricades standing, are there not?

A. Yes, there are.

Q. Now, what would be the purpose of those barricades still being placed there?

A. For the same reason, to divert traffic away.

Q. Do you know of any time that these barricades were ultimately removed, generally, from the housing area?

A. I do not know at what date they were removed.

Q. Well, it wouldn't be true, would it, that the only way that they were removed was through deterioration, finally falling down?

A. No, that is not the reason why they were taken down.

Q. Do you know, then, when they were taken down?

A. I would judge that it was in the spring of 1953.

Q. Would it have been before or after you took those pictures of the general area?

A. It would have been after.

Q. After that? Was there anything abnormal or unusual about the growing of this lawn that would take [256] from one spring to the following spring?

A. We have a definite problem of the abuse of tenants walking over these lawns, especially during the winter months when these lawns are soggy.

(Testimony of George Yamada.)

Q. Well, at no time between the time of the planting and the following spring did you remove the barricades? A. I do not recall.

Q. Did you ever have occasion to remove these barricades that had fallen onto the sidewalks?

A. If I saw them, yes.

Q. Well, did you ever do so?

A. I do not recall.

Q. Everyone had the same standing order, did they? A. Yes.

Q. And, now, did they make reports, when they saw that? A. Generally speaking, yes.

Q. Did you ever make a report to anyone?

A. Yes.

Q. And to whom did you make the report?

A. Either to Mr. Brydon or to Mr. Suder.

Q. And Mr. Brydon is who?

A. Mr. Brydon is the manager of the apartments. [257]

Q. Did you know how many complaints you made to him of that situation?

A. I do not recall.

Q. Was it more than once?

A. Possibly yes.

The Court: What situation do you refer to in making your last answer to the last question?

Do you mean the situation of the down wires from the protective fences, or what do you mean?

The Witness: If I did not have a plier or something——

The Court: I just mean, what did you under-

(Testimony of George Yamada.)

stand you were referring to by the use of the word "situation"?

What situation?

The Witness: I don't recall.

The Court: Read the last two questions.

(Last two questions read as follows:

"Q. Do you know how many complaints you made to him of that situation?

Q. Was it more than once?")

The Court: What situation were you referring to?

The Witness: The situation of the wires being down. [258]

The Court: You may inquire.

Q. (By Mr. Guimont): When those wires were down, were they disconnected, that is, from the stakes to which they were attached? Would there be open and free ends?

A. Depending on where they were cut, yes.

Q. Do you know who cut them?

A. No, but generally accepted that the children had been swinging on them, or cutting them.

Q. Referring to that area shown in your cross section on A-1, do you know whether one end of a wire barricade was attached to that telephone pole in the parking strip area?

A. Yes. It was attached to the pole.

Q. You had seen that yourself? A. Yes.

Q. And when you saw it, do you know whether you saw it prior to November 5 of 1952?

A. Well, all summer long.

(Testimony of George Yamada.)

Q. All summer long? A. Yes.

Q. And then in the fall of that year, you didn't see it, probably?

A. I am sure I have seen it.

Mr. Guimont: I believe that will be all. [259]

Redirect Examination

Q. (By Mr. Bateman): Mr. Yamada, you stated that between approximately May 1 of 1952 and October of 1953, you were on loan from the project staff to the Federal Housing Administration?

A. Yes.

Q. As a —?

A. Assistant to the inspector.

Q. Now, during that period, were you or were you not daily on the apartment house site?

A. I was on the site every day.

Q. That was your job, was it, to be there and to watch the work installations being made?

A. Yes.

Mr. Bateman: No further questions.

Mr. Guimont: I have one other question.

Recross Examination

Q. (By Mr. Guimont): Ordinarily when a wire barricade is placed along and around a newly seeded area, is it not usual that they place little cloth markers hanging from the wire?

A. Yes. It is customary to do so, and it was done at the project. However, the children kept

(Testimony of George Yamada.)

tearing [260] the little pieces of string off them as fast as they could be replaced.

Q. Was any effort made after July 1, 1952, to continue replacing those wires by that means? I mean, remarking the wires with those cloth markers?

A. I do not recall.

Q. Do your pictures of A-11 and A-12 that you took in the spring of '53, show any such markings attached to the barricade wire?

A. They do not.

Q. Do the pictures from A-3 to A-10, inclusive, show any such markings on the barricade wires?

A. They do not.

Q. When did they cease placing those markers on barricade wires?

A. I judge sometime in June of that year.

The Court: What year?

The Witness: 1952.

Q. And what is the purpose of placing the markers, such as a piece of cloth or ribbon?

A. To make them more visible.

Mr. Guimont: I believe that is all.

Further Redirect Examination

Q. (By Mr. Bateman): Mr. Yamada, do the pictures shown as [261] Exhibits A-3 through A-10 show any of those wire barricades at all?

A. Not of the type under question.

Q. What sort of barricades, if any, are shown in those particular pictures?

A. On Exhibit A-12 they show——

(Testimony of George Yamada.)

Q. No, I am referring to Exhibits A-3 through A-10.

A. A-3 to A-10, there are no barricades.

Q. What is the situation with Exhibit A-11 and A-12?

A. On Exhibit A-11, there is a steel fence with steel posts and wires.

Q. Is that the same type of barricades which were being used in November of 1952?

A. No, they are not.

Q. What is the situation with respect to those shown in A-10? What is the difference?

A. These fences are more permanent. They are intended to be more permanent than those which were installed after the seeding.

Q. And is it or is it not equally customary to install barricades such as were being used on the project after June of 1952 without the strings and ribbons on the wire? [262]

A. Yes, sir. It has been customary.

Mr. Bateman: No further questions.

Further Recross Examination

Q. (By Mr. Guimont): It is safer to attach, though, either cloth ribbons or ribbons on the barricade wire, is it not? A. Yes.

Mr. Guimont: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Bateman: I would like to call Mr. Hansen.

OSCAR F. HANSEN

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you state your name, please, Mr. Hansen?

A. Oscar F. Hansen.

Q. Will you spell your last name?

A. H-a-n-s-e-n (spelling).

Q. Where do you live, Mr. Hansen? [263]

A. 5113 Ruggles Street, Seattle 88.

Q. What is your occupation?

A. Landscape gardener, and landscape contractor.

Q. How long have you been so employed?

A. I believe together, Miller & Hansen, for eight years, a little better.

Q. Were you in that same line of work prior to that time?

A. Off and on, for 25 years except for a short period during the depression period.

Q. In the Seattle area?

A. In Seattle. Well, we also worked south of town at times on different jobs.

Q. Have you had the occasion in that work to install lawns, from time to time?

A. Yes, quite a few.

Q. By "quite a few" you mean several each year?

(Testimony of Oscar F. Hansen.)

A. Yes, Buena Vista, Holly Park, and also in Renton.

Q. Any other large lawn areas?

A. Yes, quite a few others.

Q. Were you each time supervisor?

A. In most of them. [264]

Q. Mr. Hansen, did you have anything to do with the installation or re-establishment of lawns at the Lake Burien Apartment Project in 1952?

A. Yes. I was in charge of it.

Q. Did your firm,—by the way—are you self-employed?

A. Yes. We have two partners together.

Q. What is the name of your firm?

A. Miller & Hansen.

Q. And did your firm have a contract for the re-establishment of those lawns? A. Yes.

Q. And during what months of 1952 was that work performed?

A. Well, I believe we started April, May and June, and I don't remember exactly—part of July—but I don't remember. I haven't got the records with me.

Q. Do you know how much lawn area was installed by you at that time?

A. Well, I believe it was perhaps 135,000 feet, but I figure a little better than two acres and a half. Something like that.

Q. And those were in various shaped pieces and parcels, were they? [265]

(Testimony of Oscar F. Hansen.)

A. Yes, lots of small parcels, and some large areas.

Q. What, if anything, did you do with respect to the protection of those areas?

A. Well, we had 1x4's mostly or rough-cut lumber. We placed them at various lengths around eight feet apart, and we used a strand of wire, and it was fastened mostly with staples or tied around the posts in some place to give it strength.

Q. And that was placed where?

A. All around different places where the new seedings were.

Q. Are you acquainted with the general practice in landscape gardening work with respect to the protection of newly seeded lawn areas?

A. Yes, but it was because of many children there. After you seed some place where there is a lot of children, you plant an area there with *grace*, and first thing you know, the children are right in there, spading it up and digging, and you have to provide some temporary fence to keep them out of there. Otherwise, you will never have a lawn.

In fact, we had to re-seed several times in order to get the grass up. Even if you have a fence, it wouldn't help at times. [266]

Q. Your firm, then, put in these barricades such as you have described? A. Yes.

Q. And you are acquainted with general practice in landscaping work in that respect? A. Yes.

Q. Were those barricades of the type generally

(Testimony of Oscar F. Hansen.)

put in or commonly put in to protect new lawn areas?

A. Yes, and they are most practical.

Q. In what respect?

A. Well, they were easy to put up, and easy to repair, and they could be moved easily.

Q. Now, did you have any program for the maintenance of these barricades while the lawns were coming up?

A. Yes, I would walk around part of it in the morning, and I would send a man to look over what I couldn't look over, and I detailed one or two men to fix the fences, depending on how many were down. If there were quite a few down, I would send a couple of men to repair them, and then I usually made the rounds in the afternoon to see if everything was okeh for the night.

Q. And from your experience in this work, you have heard the testimony of Mr. Yamada, have you? [267]

A. Yes.

Q. With respect to the time fences were maintained there in the area shown on Exhibit A-1, can you orient yourself to that portion of the Burien Project, Mr. Hansen?

A. Yes, I know the portion.

Q. You understand that drawing?

A. Yes.

Q. In your opinion, would it be in keeping with good practice for the management of the apartment project to have maintained the barricades around the area on that ground as having been put in new

(Testimony of Oscar F. Hansen.)

lawn area as late as November and December of 1952?

A. Yes. It takes quite a while before you get heavy sod so that you can walk on it without wearing it out in a short time. There is a lot of moisture in that area.

Q. What considerations determine the length of time that such barricades should be maintained?

A. Well, it depends on the soil and the condition of the soil and the growing season has a lot to do with it, the difference in the weather, and also the traffic. People usually travel in that place.

Q. And having those considerations in mind, you think it would have been good practice to have [268] maintained that barricade that long in that area? A. Yes.

Mr. Guimont: I am going to object to that question and move the answer be stricken, it being leading.

The Court: The objection is overruled and the motion is denied.

Mr. Bateman: You may inquire.

Cross Examination

Q. (By Mr. Guimont): Mr. Hansen, did you have a considerable problem during the period that you were on the project with the fences and the barricades being torn down?

A. Well, we had for a few days after they were put up, but then we worked in different areas. We start in one end of the project and we had—some-

(Testimony of Oscar F. Hansen.)

times, we had to watch them right along, and other places, the children left them alone. It depended on the neighborhood.

Q. Now, did you complain to anybody about the difficulty you were having?

A. No. I worked on so many housing projects I was used to it, so I made the best of it.

Q. Did you, when you had the responsibility of barricading the fencing area, did you place on the [269] barricade wire ribbons or pieces of cloth?

A. Yes. We use a coarse twine, and tied it on there. We tried to tie it on everywhere they could put it, but the children used to tear them down, and we finally gave it up.

Q. During the period of time you did that,—that is the best practice, is it not, and the most customary way of marking?

A. It is the customary way in obvious places where people are likely to cross.

Q. Did you have two men fixing these fences all day long?

A. No. I sent one man. I made a round myself and if anywhere it was down, I would go and tell one or two men to go and have the fence fixed.

Q. How often did you make that inspection?

A. Every day.

Q. Every day? A. Every day.

Q. Do you know whether every day there were fences down when you were on the project?

A. Not every day, but most of the time.

Q. Most of the time?

(Testimony of Oscar F. Hansen.)

A. Yes, in certain places.

Q. Do you believe that in that area it would [270] be necessary to make a daily inspection of those barricades? A. Yes.

Mr. Guimont: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

OLIVER ESTER

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you please state your full name, Mr. Ester?

A. Oliver Ester.

The Court: How do you spell your last name?

The Witness: Ester, E-s-t-e-r (spelling).

Q. (By Mr. Bateman): What is your address?

A. 15243 27th Avenue Southeast, Seattle.

Q. What is your occupation?

A. Landscape architect, and landscape contractor.

Q. How long have you been engaged in that [271] work? A. 24 years.

Q. In the Seattle area?

A. In the Seattle area, elsewhere, too.

Q. How long have you been engaged in that work in the Seattle area?

(Testimony of Oliver Ester.)

A. Well, the work is predominantly in Seattle.

Q. Have you during the years engaged in that work had the occasion to install a number of lawns?

A. Yes, I have.

Q. Have you had the occasion to supervise the installation of additional and other lawns?

A. Yes, I have.

Q. Are you familiar with practices in that occupation or that business in this area?

A. Yes, I am.

Q. And have you been for a number of years?

A. Yes.

Q. Have you heard testimony of Mr. Yamada with respect to the nature of the barricades or fences which were installed around the newly seeded lawn areas in the Lake Burien Apartment Project during the late spring, summer and fall of 1952?

A. Yes, I heard his remarks.

Q. Have you formed any opinion as to whether [272] or not the nature of those barricades conformed with common practice in this area at that time and at the present time for the protection of newly seeded lawn areas?

A. His testimony conforms with the usual practice.

Q. You mean by that that fences of the nature described are of the type commonly used in this area for the protection of newly seeded lawn areas?

A. That is right.

Q. From your experience in this field, do you have an opinion as to whether or not it is necessary

(Testimony of Oliver Ester.)

to protect newly seeded lawn areas by some sort of device for barricade?

A. If you have any traffic problem, it is absolutely necessary.

Q. Is that your opinion? A. Yes.

Q. What, if anything, is determinative of the length of time such protection has to be maintained?

A. It depends on the owner, to some extent. However, it generally runs from six to eight months I have left them up. I have also left them up a year.

Q. What are the considerations that entered into your decision as to what is good practice in that respect? [273]

A. Whether or not the lawn has developed satisfactorily to an extent where it would stand normal traffic.

Q. Does the nature of the traffic in and out the area have any effect on the length of time they should be maintained? A. Definitely.

Q. I will ask you whether or not the condition of the weather then ensuing and forthcoming in the next few months has any effect upon whether or not they should be removed at any certain time?

A. I am not sure I understand just what you mean.

Q. Well, does the amount of moisture in the ground and expected precipitation determine how long the fences or have any effect upon determining how long they should be maintained?

A. Yes, it could.

(Testimony of Oliver Ester.)

Q. What is the situation, and what effect does that have?

A. In a spring planted lawn, if the lawn had not developed satisfactorily, I would consider leaving the barricade through the fall and winter. Generally, I would leave it through the first winter, anyway.

Mr. Bateman: You may inquire. [274]

Cross Examination

Q. (By Mr. Guimont): Mr. Ester, when you yourself erect barricades consisting of a wire fencing, single strand running between stakes, do you place on the wire any ribbon or any cloth marker?

A. Only if the wire is higher than four feet. Anything above probably three and a half or four feet, we would sometimes, or if there is a rather heavy traffic likely to go across, we might or probably would put markers on.

Q. If you were in an area where there were groups of children that you were anticipating might get onto the lawn area, would you in that instance place any markers on the wire if the fencing was only, say, 12 to 18 inches high?

A. We do not put markers on low fences, no.

Q. And that is, you would say, a normal and customary way that landscape gardeners would do?

A. It is the normal practice.

Q. That practice is not followed by all landscape gardeners, is it?

A. That, I couldn't say.

(Testimony of Oliver Ester.)

Q. You have yourself known of many contractors who do place little markers on the wires, have you not? [275]

A. That, I couldn't say.

Q. You have yourself known of many contractors who do place little markers on the wires, have you not?

A. No, I can't say that I do. I merely told you what I do.

Q. What you do? A. Yes.

Q. How long have you been a contracting landscape man? A. Twenty-four years.

Q. Just in this area?

A. Predominantly in the Seattle area.

Q. Where else have you been a landscape gardener?

A. Outside of The Dalles and in Oregon and North and South of Seattle.

Mr. Guimont: I believe that is all.

Mr. Bateman: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Bateman: May Mr. Ester and Mr. Hansen be excused permanently?

The Court: They are excused.

Mr. Bateman: I would like to call Mr. [276] Brydon as the next witness.

JAMES BRYDON

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you state your name, please? A. James Brydon.

The Court: Will you spell your last name?

The Witness: B-r-y-d-o-n (spelling).

Q. (By Mr. Bateman): And what is your occupation, Mr. Brydon?

A. Resident manager, Lake Burien Heights.

Q. Where do you live?

A. 1105 Southwest 139th.

Q. How long have you been working as a manager of that apartment?

A. Practically three years and a half at Lake Burien Heights.

Q. You were there then and were manager in November of 1952? A. I was.

Q. Have you ever managed any other apartment project? [277] A. Yes, I have.

Q. Where?

A. I managed one at 4321 Linden Avenue, from 1938 to 1946.

Q. What was it?

A. That was a small unit court.

Q. That is in Seattle?

A. Yes. And from June of '48 to October of '50, I managed a 202 unit court project in Boise, Idaho.

(Testimony of James Brydon.)

Q. And after that?

A. I came back here and went out to Burien Heights.

Q. And you have been there ever since?

A. For three years.

Q. How many units are there in the Lake Burien Project? A. 544.

Q. By "units", you mean housing units?

A. Apartments, yes.

Q. How many apartment buildings are there?

A. 44.

Q. Do you know approximately the area that the project covers?

A. Somewhere around 35 acres. [278]

Q. What staff do you have there in connection with the management and the operation of that apartment building?

A. At the present time?

Q. Yes.

A. Approximately—I think there are 25 maintenance men and three ladies in the office.

Q. Was that approximately the situation in November of 1952?

A. No. There were 22 men outside of myself and the three ladies in the office.

Q. Mr. Brydon, showing you Defendants' Exhibit A-13, can you tell me from an examination of that, how many men you had on staff in November of 1952 as outside maintenance men?

A. Strictly grounds men?

(Testimony of James Brydon.)

Q. Outside maintenance men and then distinguish if there is a distinction to make.

A. Nine outside groundsmen and five general maintenance men, also two garbage men.

Q. Would you describe the duties of the grounds maintenance men?

A. It was strictly a grounds maintenance proposition, mowing, watering, trimming, fixing fences, and whatever outside work, street sweeping, et cetera. [279]

Q. Will you describe the work of the general maintenance?

A. General maintenance men were carpenter work, plumbing work, electrical work, heaters, furnaces, general maintenance service calls, et cetera.

Q. Would you describe the work of the garbage maintenance crews?

A. The garbage maintenance crew were strictly picking up garbage and refuse from the basements.

Q. You were at the project during the lawn re-establishment program that was carried in the spring, summer and fall of 1952?

A. I was.

Q. Are you acquainted with the barricades or fences which were placed around the newly seeded areas?

A. I was.

Mr. Bateman: Mr. Bailiff, would you show the witness, please, Exhibits A-1 and A-2?

(Bailiff hands exhibits to witness.)

Q. (By Mr. Bateman): You are now looking at what exhibit, Mr. Brydon?

A. A-1.

(Testimony of James Brydon.)

Q. Are you aware of what that drawing represents? [280] A. Yes, I am.

Q. And are you acquainted with that portion of the project? A. Yes.

Q. And you have oriented yourself to where that is situated in the Project? A. Yes, sir.

Q. Would you describe to me the duties of the two garbage men you referred to on your staff?

A. The garbage men three days a week pick up the garbage from the apartments themselves, and three days a week they pick up from the basements, and they are in and around the project all day long, in the front streets and in the parking areas.

Q. That is to say, a pickup is made from each of the buildings, each day, by the garbage crew?

A. Either upstairs or down.

Q. And they enter or leave the building in the process of that operation?

A. That is right.

Q. And that was the procedure or practice carried out during November of 1952?

A. That is right.

Q. Do you know what time of day that pickup was made from the building or buildings which are shown on [281] Exhibit 1?

A. Well, I would say somewhere between ten and eleven in the morning.

Q. Was there any other daily task performed by anyone on the outside crew that took him in the vicinity of the apartment project that is shown in Defendants' Exhibit A-1? A. Yes.

(Testimony of James Brydon.)

There was one man who was delegated every morning to make the rounds through the project fixing fences.

Q. Who was that man? A. Mr. Dykeman.

Q. And was he so delegated and assigned in November of 1952? A. He was.

Q. Was there any other member of the outside maintenance crew that made a daily round of the area shown on Exhibit A-1?

A. Not for any specific purpose.

Q. Refreshing your memory, do you know whether or not there was a man assigned to lawn pickup work?

A. Yes, there was. I forgot that.

Q. Of what did his duties consist?

A. His duties consisted of picking up papers [282] and sweeping streets.

Q. Was it his duty to make a round each day?

A. Five and a half days a week.

Q. That included the area on the project shown on that exhibit? A. That is right.

Q. Do you know what time of day his assigned task would carry him through that area?

A. No, I don't exactly, because sometimes he went on one side of the street, and sometimes down the other first. Normally, I believe it was after lunch.

Q. What were the working hours of the outside maintenance crew?

A. From eight to twelve, and twelve-thirty to four-thirty.

(Testimony of James Brydon.)

Q. How many days a week?

A. Five and a half days a week.

Q. Monday through the middle of the day on Saturday? A. That is right.

Q. Was there any other outside personnel?

A. Yes, there was a night man.

Q. What were his working hours at that time?

A. At that time, they were 5:30 to 2:30. [283]

Q. And what was the general nature of his duties?

A. He was maintenance and night watchman, maintenance probably for the first three or four hours in the evening.

Q. And who was night watchman at that time?

A. Mr. Cvetikovs.

The Court: How do you spell it?

The Witness: C-v-e-t-i-k-o-v-s (spelling).

Q. (By Mr. Bateman): That is the gentleman who testified this forenoon? A. Yes.

Q. Referring to the outside maintenance crew, were they or were they not given any instructions or orders with respect to the fences which were placed around this new lawn area?

A. All outside grounds crew have been given orders ever since I have been there that anything out of the ordinary seen outside of their immediate work that was wrong, to report it to the office or to the superintendent, if they saw it on the grounds. That would mean fences or anything of that kind that was a menace to the project.

Q. Were those reports made to you? [284]

(Testimony of James Brydon.)

A. Sometimes to me, and sometimes to Mr. Suder, the superintendent.

Q. Who is Mr. Suder?

A. Superintendent.

Q. Of what?

A. Of the Lake Burien Housing Project.

Q. Is he assistant to you as manager?

A. That is right.

Q. In what particular area of the problem of managing that unit do his duties and supervisory duties fall?

A. All over the whole project, inside and out.

Q. Along maintenance work lines?

A. Maintenance, inspections, anything.

Q. Do you have any office personnel other than yourself?

A. Yes, we have three ladies in the office.

Q. In general, what are their duties?

A. Mrs. Wilson is the assistant manager and office manager. Mrs. Ester is the stenographer, and Mrs. Baker is the bookkeeper.

Q. Do you have any method of handling complaints which may be received from tenants?

A. Yes, we do. [285]

Q. What is that method?

A. When those telephone calls come in, or people come in, they are made on a regular form and hung up on a spindle in the back room outside of the office, to be picked up by the maintenance men as they come and go all day long.

(Testimony of James Brydon.)

Q. Who receives such reports, complaints, and questions? A. You mean in the office?

Q. Yes.

A. Either Mrs. Ester, Mrs. Wilson or Mrs. Baker, depending on whether the others are busy.

Q. And it is the practice, then, to make out a work request on those? A. That is right.

Q. Was that practice followed with respect to complaints, if any, with respect to fences?

A. Every detail in the place.

Q. Including fences? A. Yes, sir.

Q. I will ask you whether or not the tenants were ever given permission by you or through your office to be on lawn areas which were surrounded by these barricades? A. Never. [286]

Q. Calling your attention to Exhibit A-1, Mr. Brydon, are you acquainted with the exterior lighting facilities in that area? A. Yes, I am.

Q. Can you designate on A-1 what exterior lights there are in that area?

A. You mean you want me to mark it on there?

Q. Yes, if you will, with a blue pencil.

(Witness draws on Exhibit A-1.)

Q. Have you done so?

A. Yes, I have.

Q. Would you put your initials "J.B." after each of those designations?

(Witness writes further on Defendants' Exhibit A-1.)

Mr. Bateman: May I see the drawing?

(Testimony of James Brydon.)

(Bailiff hands Defendants' Exhibit A-1 to Mr. Bateman.)

Q. (By Mr. Bateman): Mr. Brydon, I wish that you would check Exhibit A-1 again and examine the places where you put a designation of lights, and be certain and assure yourself that you correctly understand the drawing. Will you describe for me where in that area there are exterior lights, outside lights? [287]

A. Yes. There is one on the building just directly west of the building in question.

Q. And tell me whereabouts on that building is that light located?

A. About 20 feet above the ground, I would say, right under the eaves.

Q. How high are those buildings? How many stories? A. Two.

Mr. Bateman: Mr. Bailiff, may I see the photographs, the large photographs, Exhibits 3 through 10?

(Defendants' Exhibits A-3 through 10, inclusive, handed to Mr. Bateman.)

Q. (By Mr. Bateman): Showing you, Mr. Brydon, Exhibits A-4 and A-10, are those pictures of the light which you have just designated?

A. That is right.

Q. As being on the building lying west to the telephone pole which is centered on this drawing A-1? A. That is right.

Q. How do you designate, or in what manner do you refer to that type of light?

(Testimony of James Brydon.)

A. Area lights.

Q. Showing you, Mr. Brydon, Exhibit A-7, do you recognize that as being a photograph taken in the area [288] shown on A-1? A. Yes, sir.

Q. Calling your attention to the light which is shown in that picture suspended from an arm on a light pole, will you designate on drawing A-1 the position of that light?

(Witness writes on Defendants' Exhibit A-1.)

Q. And will you put your initials after the designation? A. Yes, sir.

(Continues writing on Defendants' Exhibit A-1.)

Q. Now, how do you designate that light that you have just indicated on the drawing?

A. That is a street light.

Q. Is that a source of illumination at night in this particular area? A. Yes.

Q. Are there any other lights that provide night illumination in this area shown on Exhibit A-1?

A. They are not shown on Exhibit A-1.

Q. I mean, are there any other lights?

A. Five floodlights over in the shopping [289] district.

Q. And I will ask you whether or not they supply illumination in the area shown by the drawing, Exhibit A-1? A. Yes, they do.

Q. Have there been any changes in the outside illumination that you have just referred to since November 5 of 1952?

(Testimony of James Brydon.)

A. No, there hasn't.

Mr. Bateman: You may inquire, Counsel.

The Court: I believe at this time and place, we will take a short recess of about five minutes.

(Recess.)

The Court: You may resume the interrogation.

Mr. Bateman: May it please the Court, may I interrupt for just one moment? I would like to ask that the witness, Mr. George Yamada, be excused.

The Court: Any objection?

Mr. Guimont: No objection.

The Court: That witness is excused.

Cross Examination

Q. (By Mr. Guimont): Mr. Brydon, you have nine men that are on outside work on the grounds at all times, is that [290] right, summer, winter?

A. Sometimes in the summer, more.

Q. Sometimes more than that? A. Yes.

Q. And along about November, you would have at least nine men on the grounds?

A. Well, they wouldn't be out on the grounds all the time. It would depend on the weather conditions. If they weren't outside, they would be inside.

Q. And in addition to that, you have two garbage men and five general maintenance men?

A. Yes.

Q. In removing garbage from the area shown in A-1, the building that was occupied by the Dooleys, are you familiar with that building?

A. Yes.

(Testimony of James Brydon.)

Q. And in removing that garbage, would you, with a blue pencil, trace the steps that the garbage people would take in removing garbage from that building?

A. The one they were in in '52?

Q. Yes. Just make a dotted line showing where they would remove garbage from the building and where they would go in taking it, if you know.

(Witness draws on Defendants' Exhibit A-1.) [291]

Q. Am I accurate in saying that you have marked a line showing that the garbage men would come out of a door on the south side of the building, walk west on the outside of the building, and then travel north to the parking strip, or an asphalt area? A. That is right.

Q. West or north of the building?

A. Yes.

Q. Would they have a truck parked in that asphalted area? A. Yes, they would.

Q. In doing that, they would be across the parking strip, would they, Mr. Brydon, that is east of the telephone pole placed in the section of the parking strip that is north of the building?

A. I didn't get that question, please.

Q. You have marked on this that they have crossed apparently an area off of the sidewalk area itself with the lines you have marked, is that correct?

A. There is a sidewalk direct from the parking

(Testimony of James Brydon.)

area directly south to the south side of that building and then into the building.

Q. Yes?

A. And that is the way that they would walk.

Q. Would you re-do this and mark it much heavier [292] so that it can be seen?

A. Yes, I will. (Draws on Defendants' Exhibit A-1.)

Q. Did you receive any reports from any garbage men in November of 1952 of any fencing being down?

A. I wouldn't remember. They came in from time to time, but I wouldn't remember dates.

Q. Did you keep any permanent evidence of reports and complaints that were received?

A. We kept those reports for back about a year, and then they were destroyed, because there were so many hundreds of them that came in for one thing and another.

Q. Did you have many reports of fences being down?

A. Quite a few.

Q. And when they were down, were the reports that they were strewn across the sidewalk areas?

A. Sometimes.

Q. When they were strewn across the sidewalk areas, did you yourself ever go out to inspect them?

A. Yes.

Q. And when you were out there, did you find wires curled? [293]

A. Sometimes.

Q. Did you yourself ever trip over any of these wires?

A. No, I didn't.

(Testimony of James Brydon.)

Q. Did you have any complaints of anyone else ever tripping over the wires?

A. Not personally, no.

Q. Did you have any complaints of those wires being down at the nighttime?

A. No complaints at night. If they came in at night, why, they were left on my desk, and I got them in the morning.

Q. Did you testify that the complaints did come in at night?

A. Occasionally, they did come in at night, and the night man would get them.

Q. Now, this man whose duty it was to inspect wires, was that his sole duty?

A. That was his sole duty for whatever time it took him between 8:00 o'clock in the morning and he got the job done each day.

Q. And how long would it ordinarily take him to do that?

A. I have seen it take him an hour, two hours, or all day. [294]

Q. If it were all day, would it be because there were a lot of wires down?

A. That is right.

Q. Who would be cutting these wires?

A. Well, they would be cut by children, be cut by the paper boys, be cut by the grown-ups, cut by the tenants, grown-up tenants, being swung on and broken.

Q. Now, you don't recall having received any notice from any of your maintenance men that they

(Testimony of James Brydon.)

had repaired a wire that was located on an area that is shown on Exhibit A-1 and circles the general lawn area where that pole is placed in that parking strip area? That is just west of the Dooley apartment. A. No, no specific call, no.

Q. Do you recall any complaints having been made to that area between—— A. No.

Q. (Continuing) ——between Saturday prior to November 5, 1952 and November 5, 1952?

A. No, because my orders were for the men to fix them as they came to them.

Q. Were any notations made of repairs having been accomplished?

A. No. That was just a routine matter for [295] fixing them as they came to them.

Q. If there had been any complaint made of that particular wire being down, by now the records are destroyed, do I gather that?

A. Yes. A lot of those old records are.

Q. When did you first become aware, Mr. Brydon, that Mrs. Dooley had fallen in that area?

A. On December 10 or 12, right in there.

Q. Was that after she had returned from the hospital? A. Yes.

Q. Were you present on the project from November 5 on? A. Yes.

Q. Did anyone else at the project hear of the accident? A. Yes.

Q. Who had heard of it?

A. Mrs. Wilson, the office manager.

Q. When did she first hear of it, do you know?

(Testimony of James Brydon.)

A. Same day that I did. She told me.

Q. She told you? A. Yes.

Q. You heard about this in December, you say?

A. That is right. [296]

Q. Of 1952? A. Yes.

Q. At that time, did you have the slips from the spindle for the complaints that had been received?

A. No.

Q. You didn't destroy them until a year later, you say?

A. I didn't even keep all of them. There were so many of them—a minor detail like a fixed wire was simply repaired and checked by the man that repaired it, and then we destroyed it if it wasn't any too important. That was just a matter of daily maintenance. It wasn't any specialty.

Q. Now, would you point out to the Bailiff and perhaps he could point it out to me where that street light is that you say to me is a source of illumination? A. Right here (indicating).

The Court: Say it in words if you can as to location.

The Witness: On that building directly west of the building Mrs. Dooley lived in.

Q. (By Mr. Guimont): Is that a street light?

A. No. That is an area light.

Q. Is that a floodlight in any sense? [297]

A. No, it is a 300 watt light with a daylight globe around it.

Q. And would you have any knowledge of

(Testimony of James Brydon.)

whether or not it was on on the evening of November 5, 1952? A. Yes.

Q. And just how would you have that knowledge?

A. From the light company and our records.

Q. And you have checked that record?

A. That is right.

Q. Did you check the records to determine whether the floodlights were on at night?

A. You mean on the street?

Q. In the shopping area.

A. No. I didn't, because I have no jurisdiction over the shopping area.

Q. Now, you don't know whether the floodlights were on or off?

A. I presume they were, because they were checked every week like ours by the City Light.

Q. But you actually have no knowledge?

A. Actually have no knowledge, no.

Q. Now, have you inspected the area yourself near that pole? A. Yes.

Q. Since this has come about? [298]

A. Yes.

Q. That light that is on the building west of the Dooley building, that is obstructed, is it not, that is, the light from it is obstructed by a picket fence?

A. No, it is not.

Q. How far back from the picket fence is it?

A. Oh, I would say ten or twelve feet, and about 15 feet higher than the picket fence.

Q. Is there any shadow cast by that fence?

(Testimony of James Brydon.)

A. Directly on that sidewalk, no.

Q. Is there any shadow, cast by that fence, **Mr. Brydon**, at any place?

A. Yes, right under the fence.

Q. And how far out does that shadow extend from that fence?

A. I would say probably four or five feet, six feet, maybe.

Q. Is there beyond the picket fence a pipe fence?

A. Yes. There is a play yard there with a fence around it, but that is a low fence.

Q. How big a pipe top has that play fence?

A. Well, it is a four-foot fence with a pipe top which I think is two-inch, inch and a half. [299]

Q. Does that picket fence cast a shadow across the walk?

A. No. That isn't a picket fence. It is a wire fence.

Q. Does the steel fence cast any shadow?

A. Not to speak of, because it is an open fence. It is an open mesh fence.

Q. Does the two-inch steel pipe topping cast a shadow?

A. Not noticeably, no.

Q. You have inspected specifically for it?

A. Yes, I have.

Q. And when did you make your inspection?

A. Oh, I made it two or three times, and the last time, last night.

Q. And when you made the inspection, the light was on?

A. Yes, sir; it was.

(Testimony of James Brydon.)

Q. When you made the inspection, were the floodlights on? A. Yes, they were.

Q. How far from this area are those floodlights?

A. Oh, I would say approximately 150 feet.

Q. Then you differ with Mr. Dooley who places them about 350 feet, is that so? [300]

A. I don't know. I don't remember what Mr. Dooley said. I may be wrong in my estimation of the distance there.

Q. Do you wish to try and figure it out?

A. Let's see. Yes. Yes, I will change that to around 250 to 275 feet. Thank you.

Q. Now, did you have considerable complaints from the time that the landscape gardener turned over the lawns to your crew until November of 1952, did you have considerable complaints about the fence being down?

A. Oh, we had a few, not too many, because of the fact that the landscape man was taking care of them himself.

Q. I mean, after he left.

A. After he left, we had a few, but the fact that we were around every day took care of most of them. If they happened late or at night or in the evening, then we would catch them occasionally.

Q. When did you make your inspection last night? A. Last night?

Q. Yes.

A. About a quarter of eight, I think.

Q. Did you see Mrs. Dooley there at that time?

A. No, I didn't.

(Testimony of James Brydon.)

Mr. Guimont: That will be all.

A. (Continuing) I am not sure of exact time, but I would say that it was somewhere about that time.

The Court: You may step down.

Mr. Bateman: May I ask on redirect just one question?

The Court: Have in mind, I believe you spoke of the possibility of finishing this afternoon. Will you kindly have that in mind? You may proceed.

Redirect Examination

Q. (By Mr. Bateman): In making an inspection examination of the lighting condition last evening, did you check your ability to read by the light in the vicinity shown on Exhibit A-1?

A. That is right.

Q. Where were you standing at the time?

A. Right by the telephone pole.

Q. And what did you do?

A. I just took my card case out of my pocket, and held a calling card out about a foot from my face and I was well able to read it.

Q. Showing you Exhibit A-8, calling your attention to the top of the telephone or light pole [302] there and an object on it, I will ask you whether or not that is one of the floodlights that you refer to as being around the shopping center?

A. Yes, it is.

Q. And how many are there?

A. There are five altogether, I believe.

(Testimony of James Brydon.)

Mr. Bateman: No further questions.

Recross Examination

Q. (By Mr. Guimont): What was the condition of the weather last night out there?

A. At the time I was out, it was somewhat overcast. It started in to rain just as I got back to my apartment, just a little bit.

Q. Had it been raining before?

A. No, not when I went out.

Mr. Guimont: No further questions.

Mr. Bateman: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Bateman: May I call Mr. Suder, please?

CLARENCE SUDER

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you state your name, please? A. Clarence Suder.

Q. And where do you live, Mr. Suder?

A. 2226 Eastmont Way, Seattle.

Q. What is your occupation?

A. I am the maintenance superintendent at Lake Burien Heights.

Q. And how long have you been so employed?

(Testimony of Clarence Suder.)

A. About three and one-half years.

Q. What are your duties as such?

A. To supervise all maintenance work in the project, both inside and outside, and to keep tabs on the workmen, instruct them in their duties, if necessary.

Q. You are acquainted with the lawn re-establishment program that took place there in 1952?

A. I am.

Q. And with the fences or barricades which were maintained around the newly seeded areas?

A. Yes.

Q. And, directing your attention to Exhibit A-1, are you acquainted with the area of the Lake Burien Heights Project shown in that exhibit?

A. Yes, I am.

Q. And you understand that drawing, do you?

A. Yes.

Q. You are thoroughly oriented to it?

A. I am.

Q. Showing you Exhibits A-3 through 10, do you recognize those as pictures taken in that area of the project? A. Yes, I do.

Q. And I believe each one of those pictures shows a telephone call rather centrally located in the picture? A. One of those—

Q. There may be one or two that do not show the light, but can you locate yourself from those pictures with respect to that telephone pole shown on the drawing in A-1? A. Yes, I do.

Q. Can you very quickly, if possible, indicate

(Testimony of Clarence Suder.)

by a small number on Exhibit A-1 the position from which each one of those pictures was taken, and let the number [305] you put the designation on with be in red pencil and be the same number as appears on the exhibit, that is the corresponding exhibit number? If you come to one that is not shown or does not pertain to that precise area, please indicate.

A. I believe all of them are shown (marking Defendants' Exhibit A-1).

Q. Mr. Suder, will you now at each one of those numbers that you indicated to indicate the position where those pictures were taken, point an arrow in the direction in which the camera was pointed at the time?

A. I believe I have them all marked.

(Further drawing on Defendants' Exhibit A-1.)

Q. Thank you. Now, Mr. Suder, in connection with your duties as maintenance supervisor at the project, and you were so employed on November 5, 1952?

A. Yes.

Q. Will you tell me at that time what daily maintenance operations were carried out in the vicinity of that area shown on Exhibit A-1?

A. Daily there was the inspection and repair of any fences that were up at that time that might need repair.

Then, aside from the regular repair of the [306] fences, there was the round that one employee made in picking up papers, sticks or stones or anything

(Testimony of Clarence Suder.)

on the lawn area that was not supposed to be there.

Q. Do you know what time of day his rounds were made in that vicinity?

A. At various times. That would depend a great deal on the amount of material or refuse found on the lawns from the time he started out at 8:00 o'clock in the morning until he finished his rounds at 4:30 in the evening.

Of course, during the day, there was also sweeping of areas and streets, which would include that vicinity there.

Q. Was there any other daily maintenance operation in that vicinity?

A. Of course, as mentioned before, there was the daily garbage pickup. Monday, Wednesday and Friday, the garbage collectors picked up the garbage from the apartments. That would be from the hallways, and on Tuesday, Thursday and Saturday, they picked up the refuse from the basements of these buildings. At that time then they would pass this area, through this area, in this vicinity.

Q. Now, is that true with respect to each of the operations you have referred to? [307]

A. Yes, that is.

Q. And by "this area", you indicate the area shown in Exhibit A-1?

A. That is the area in question.

Q. Were the operations that you have referred to carried out under your supervision?

A. Yes, they were.

(Testimony of Clarence Suder.)

Q. And those men were subordinate to you and under your direction? A. Yes.

Q. What, if any, instructions were these men given with respect to the barricade fences around this lawn area?

A. Those particular men, as well as all other men under my supervision were instructed to repair those fences if it was possible to repair them at the time, or to report any repairs necessary on them.

Q. You referred to other men. You have other men under your jurisdiction?

A. Yes. At that time, 21 men besides myself.

Q. What was the general nature of the other men under your jurisdiction?

A. As I recall, nine of them were included in the outside ground crew as we designated them. Five were janitors and three were general maintenance men, and [308] two were garbage collectors. I believe that takes care of it.

Q. Did these men in their duties have occasion to pass to and fro, or back and forth over the project site?

A. At various times they did. It would depend on how their work was lined up, and where they were needed. If they were needed in that vicinity, naturally, they would pass through there.

Q. With respect to the daily operations you have mentioned, however, that covered this vicinity in A-1 in each instance every day?

Q. What was the method of handling reports

A. Yes, it did.

(Testimony of Clarence Suder.)

that might be turned in by men under your jurisdiction as to fences down?

A. Generally, those reports came directly to me, and I would make out a work order for the particular employee who was to take care of that type of work, whatever it was. If it was fixing fences, Clayton Dykeman received the order.

If it was some other duty, then the man who was generally designated for that work, such as a plumber, carpenter, or gas furnace man, or general utility maintenance. Those men were all in the area at [309] various times of the day.

Q. If the report referred to a fence out of order, what was your practice with respect to caring for that?

A. It was given to one of the employees, generally on the ground crew, to take care of. There have been instances, however, when one of the maintenance men would be handy in the back office where they generally came in to get these work orders, and he would be dispatched to take care of it.

Q. What other source or sources were there of these work orders that you refer to?

A. Many of them came in by 'phone to the front office, in which case one of the three office ladies wrote up the order and then it was brought to the back room, put on a spindle there for the workmen to take care of.

Q. The source of the telephone reports were tenants in the Project? A. Were tenants.

Q. Or, other workmen, possibly?

(Testimony of Clarence Suder.)

A. Occasionally a workman has 'phoned in a report of that nature.

He happened to be in an apartment where there was a 'phone available to him. [310]

Q. What are your working hours at the project?

A. From eight o'clock until twelve noon, from twelve-thirty 'til four-thirty.

Q. And that was so on November 5, '52?

A. That is right.

Q. When were the reports, complaints, or reports of conditions which originated, work requests, taken care of?

A. Those were taken care of between those hours.

Q. And this spindle that you have referred to, that is placed on your desk, is it?

A. That is right.

Q. Were those reports handled daily as they came in, or were they carried over?

A. They were handled daily.

If they were carried over, it was due to the fact that they were not of an emergency nature, and could be carried over to a more convenient time.

Q. Do you ever recall in the time you have been there, and while the fence barricades were up around the grass areas, ever carrying over a request for a fence repair? A. I did not.

Q. Those were handled daily before you left?

A. I did not.

Q. Those were handled daily before you left?

A. Yes, they were.

(Testimony of Clarence Suder.)

Q. I will ask you whether or not any request was made out with respect to the daily fence repair procedure that Mr. Dykeman followed?

A. No. That was just accepted by him as one of his duties, and at eight o'clock in the morning, he proceeded to make his rounds of inspection and repair of those fences, and some of the time he used a wheelbarrow, hammer, nails or staples, rolls of wire, and stakes that he took with him in order to make those repairs on the site.

Q. Was there any interruption in the servicing and maintenance of those fences in that manner between the time they were put up in the summer of 1952 and sometime after November 5, 1952?

A. Only if we deemed that a lawn area was sufficiently well established that the fences were no longer necessary. As long as the fences were necessary, that was the daily practice, to go out and repair them.

Q. Maintenance? A. Yes.

Q. I take it then there was no discontinuance [312] of that maintenance service in September or October of 1952? A. No. There was not.

Q. Did you have any supervision over Mr. Cvetikovs, who attended to the area lights in the vicinity of the project? A. Yes, I did.

Q. What was that?

A. When Mr. Cvetikovs first came to work for us, I would write a work order for him to change the clocks at a time so that the lights would come on before it got dark. I did that regularly until

(Testimony of Clarence Suder.)

such time as I knew that he was in the habit of doing that and then merely told him that from this time forward, I would like to have him take care of that fortnightly, which he has done.

I know that he has done that, because frequently I checked myself to check these clocks myself to see that they are set properly.

Q. What were your instructions to him with respect to the time that he should set the clocks to turn on the lights?

A. Those should be set according to, and those were the instructions, that the clocks should be set so that the lights come on ten to fifteen [313] minutes after sunset, so that they are on before the area becomes darkened to the extent that it might be dangerous to travel through that area.

Mr. Bateman: No further questions. You may inquire.

Cross Examination

Q. (By Mr. Guimont): These daily fence repairs, what precipitated that much care on your part?

A. The fact that children and adults both destroyed those fences to some extent during the day or during the 24 hours of the day.

Q. Now, did you feel that it was a dangerous condition that would develop from the disrepair of the fences?

A. Yes, I did. It was dangerous in two respects. It would be dangerous to an individual travelling

(Testimony of Clarence Suder.)

there, and, also, it is dangerous to the lawn area itself.

Q. Now, did it ever occur to you that it might be safer to erect a different type of fences?

A. It could possibly be safer, but even hurricane fences that we have out there around the playyard areas have been partially destroyed, and that is one of the stoutest fences that you can put up. [314]

Q. But that would have been a safer construction than the type you used and employed?

A. That would have been a safer construction, yes.

Q. Now, did you yourself ever have occasion to make any repairs to the fence wire, to the wire?

A. Frequently, I have.

Q. Now, frequently—how often?

A. Sometimes once a week, sometimes several times a week.

Q. And that would be on a casual walk through the area, or through the project that you yourself might make, is that so? A. That is right.

Q. And that would occur at what hour of the day, if you know?

A. Any time between 8:00 a.m. and 4:30 p.m.

Q. In other words, it would occur any time that you happened to be walking through the project, you were apt to run into a broken down wire fence?

A. That is right.

Q. And would that wire be sometimes curled across the sidewalk?

A. Sometimes. They seldom ever were straight.

(Testimony of Clarence Suder.)

Q. Did you give any thought to making an [315] inspection tour through the area after the children went into their apartments or retired, in other words, along towards evening?

A. Yes, and I frequently did.

Q. And did you ever find any defects at that hour of the day? A. Occasionally.

Q. You didn't assign any men, though, to sort of clean up before the darkness would fall, did you?

A. No. Since Mr. Cvetikovs was on, he could take care of those in his rounds, also.

Q. But did he make any actual walk throughout the grounds in the area?

A. Oh, yes; he did. That was one of his duties for a patrol in that respect.

Q. You don't know whether the lights were on on that particular evening, November 5, 1952, do you? A. I do not.

Q. Do you know of any occasion in the past two and one-half years when they had any light failure in that area?

A. Yes. There was a light failure just recently.

Q. And when they do have a light failure, [316] what occurs to your switches, your time switches for the lights to be turned on?

A. Those time switches would lose the amount of time in which the power failure occurred for the duration of the power failure, and then would automatically start up again, but our procedure in that event would be to correct the time on the time clocks.

(Testimony of Clarence Suder.)

Q. Now, did you receive many complaints of the tenants with respect to these barricades being down? A. Very seldom.

Q. You took no notice of them yourself, is that it? A. Yes.

Mr. Guimont: That is all.

Mr. Bateman: You may step down.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Bateman: Will you come forward, Mr. Dykeman? [317]

CLAYTON DYKEMAN

upon being called as a witness for and on behalf of the Defendants, and upon being first duly sworn testified as follows:

Direct Examination

Q. (By Mr. Bateman): Mr. Dykeman, will you state your full name, please?

A. Clayton David Dykeman.

Q. Where do you live, Mr. Dykeman?

A. I live at 10029½ California Avenue.

Q. Where are you employed?

A. At Lake Burien Heights Housing Project.

Q. Were you employed there on November 5, 1952? A. I was.

Q. When did you go to work there?

A. I went to work, I am pretty sure that it was the 23rd of July.

(Testimony of Clayton Dykeman.)

Q. Of 1952? A. Right.

Q. And under whom were you working? Who was your immediate superior?

A. Mr. Suder.

Q. Were you assigned any particular job or duty [318] at the project when you went to work there with respect to the barricade fences which were around the newly seeded lawn area?

A. That was my first work in the morning.

Q. What assignment did you receive in that respect?

A. Well, I was to oversee the whole fence of the whole project, and fix all broken places.

Q. What routine or practice did you follow or were you instructed to follow in that respect?

A. Well, we didn't go the same way every day, but we had to make the rounds of the whole fence every day, I did.

Q. When did you that?

A. As soon as eight o'clock come, I started.

Q. And how long did you stay with that job?

A. Well, I still had that job when I got laid off.

Q. I mean, how long each day?

A. Oh, that varied; some days, it wouldn't take but, oh, maybe an hour, or an hour and a half, and other days, I was somewhere near the whole day.

Q. When did you quit?

A. I got laid off the 15th of November.

Q. Of what year? [319] A. 1952.

Q. You were constantly at that job then, from July 23 until November 15, 1952?

(Testimony of Clayton Dykeman.)

A. Right.

Q. Mr. Dykeman, how long each day did you stay with that work?

A. Well, as long as——

Q. Until the fences were fixed?

A. Yes, and then I was doing other work. If I would see anything broke, why, I would repair it.

Q. What equipment did you take with you in making your rounds?

A. Well, I had stakes and axe and hammer, pliers, and staples.

Q. Anything else? A. Well,——

Q. Wire? A. Wire.

Q. What sort of wire was used? Do you have a sample of the wire that was used? Would you hand it to the Bailiff, please?

Mr. Bateman: Will the clerk please mark that for identification?

The Clerk: It will be Defendants' Exhibit [320] A-16.

(A piece of wire marked Defendants' Exhibit A-16 for identification.)

Q. (By Mr. Bateman): Showing you Defendants' Exhibit A-16 for identification, will you please tell me what that is, Mr. Dykeman?

A. That is the size wire that they used on the fence that surrounded the lawns.

Q. During the period of time you have testified you were maintaining them?

A. That is right.

Mr. Bateman: I offer that in evidence.

(Testimony of Clayton Dykeman.)

Mr. Guimont: No objection.

The Court: It will be admitted.

(Defendants' Exhibit A-16 received in evidence.)

Q. (By Mr. Bateman): Will you tell me how the fences were constructed?

A. Well, they were stakes drove along the edge of the sidewalk about, oh, from four to 16 inches off the walk, and this wire was stretched on these posts, and stapled. [321]

Q. Stapled to the posts?

A. To the posts.

Q. About how high off the ground was it?

A. Well, I imagine they were 18 inches to two foot.

Q. Can you give me an estimate of approximately how far apart the stakes were?

A. Well, from eight to ten feet.

Q. Was that the nature of the construction of the fence in the area shown in Exhibit A-1?

Mr. Bateman: Mr. Bailiff, will you show that to the witness, and also show the witness Exhibit A-2?

(Defendants' Exhibits A-1 and A-2 handed to the witness.)

Q. (By Mr. Bateman): Calling your attention, Mr. Dykeman, to Exhibit A-2, and to the area that is marked in a red cross patch on that exhibit to indicate newly seeded area, was there a fence along the north side of the walk shown in that exhibit?

A. Yes, sir.

Q. Was the construction of that fence similar

(Testimony of Clayton Dykeman.)

to that which you have described for the fences in the project? A. The same. [322]

Q. Now, was there any fence along the other side of that same walk, Mr. Dykeman?

A. There was not.

Q. That is during the period you have referred to?

A. At the time I was there, there was no fence out south side of the walk.

Q. That is on the side closest to the building?

A. That is right.

Q. You are referring to Exhibit A-2?

A. Yes.

Mr. Bateman: You may inquire.

Cross Examination

Q. (By Mr. Guimont): Mr. Dykeman, did you make any repairs to any fence in that area at any time between November 1 and November 5?

A. Well, I made repairs every day where it needed it, but I wouldn't say that that fence was down at that time.

Q. You can't recall whether it was down or not? A. No.

Q. If it had been down—you say that you went by the area?

A. I went right by there every day. [323]

Q. And you would have repaired it?

A. Right.

Q. Would you recall how the wire was attached at the point of that parking strip that is shaded,

(Testimony of Clayton Dykeman.)

and I believe it is on the north of the walk shown on Exhibit A-1. There is a telephone pole in that parking strip.

A. Yes, it was hooked on the telephone pole, and run back to the play pen on the—next to the building there, and then it went along this lawn clear out to the street on the north side there of the lawn.

The Court: Are you describing the course?

The Witness: Of the fence.

The Court: And the attachments of the wire in the fence?

The Witness: Yes. It was hooked to this telephone pole here and this play pen fence back at the back of the building.

Q. (By Mr. Guimont): It didn't cross the sidewalk, did it? A. No, it did not.

Q. It circled the parking strip area, but it was hooked onto the pole? A. That is right.

Q. Now, do you recall ever mending it when it [324] was detached from the pole?

A. Yes, yes. I would say it has been down.

Q. Now, just when was it that you repaired it after it had been detached from the pole?

A. Oh, I couldn't tell that.

Q. Did you know of anyone having fallen over the wire? A. I did not.

Q. You never were told or informed?

A. No, I didn't know anything about it, unless just shortly.

Q. Just shortly? A. Yeah.

(Testimony of Clayton Dykeman.)

Q. When did you finish your employment with them? A. November 15.

Q. Of 1952? A. Right.

Q. And did you, just before your termination of employment with them, make any repairs to that area? A. Up to the last day.

Q. In that particular area? A. All of it.

Q. Do you recall up to the very termination of your employment repairing that area?

A. No. Not—— [325]

Q. And attached the wire to the telephone pole again? A. No, not necessarily.

Q. You can't say one way or the other?

A. No.

Q. But you did from time to time?

A. I repaired it every day that I went around that it was down.

Q. Every day it was down?

A. No, every day that it was down.

Q. You recall now about how often it was down?

A. Oh, not too often, because that had pretty good bearings.

Q. What type of staple did you use?

A. Well, oh, a staple about the size of the wire, or a little heavier.

Q. And in using that staple, were you driving it in on the end of the wire, that is where you were tying the end of the wire, or something; what kind of a knot or——

A. Oh, we would wrap it around the stake a couple of times and then staple it.

(Testimony of Clayton Dykeman.)

Q. Were you instructed at any time to attach any ribbons to the wires? [326]

A. Well, there was twine on the wire when I took over—at certain places.

Q. Were you instructed to continue it?

A. No, I didn't.

Q. What would be the purpose of having the twine? A. Sir?

Q. What would be the purpose of having the twine?

A. Well, so they could see the wire better.

Q. As a warning?

A. Warning, that is right.

Q. Would you consider that a proper way of giving warning?

A. Well, I think it was very necessary until they got adjusted to the fence.

Q. Did you believe that, with the fences down every morning when you went around there, that they had become adjusted to the fences up to the time that you left there?

A. No, not entirely, because some of them didn't respect the fences.

Q. Did you have occasion in your travelling on the repair route to find the wires askew or across the sidewalks? [327]

A. Oh, there were times, yes, that it was drawn across the sidewalk.

Q. Would they be visible at night, in your opinion?

(Testimony of Clayton Dykeman.)

A. Well, I think it is lighted well enough so they could see them.

Q. You would say that with respect to all areas?

A. Yes, sir.

Q. Did you travel around in the evening out there at all? A. Not after 4:30.

Q. So that your experience then is only during daylight hours on a project?

A. That is right.

Mr. Guimont: That is all.

Redirect Examination

Q. (By Mr. Bateman): Have you ever been on the project during the evening hours?

A. Yes.

Mr. Bateman: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness. [328]

Mr. Bateman: May it please the Court, Mrs. Wilson.

MARION S. WILSON

upon being called as a witness for and on behalf of the defendants, and upon being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bateman): Will you state your name, please? A. Marion S. Wilson.

Q. Where do you live, Mrs. Wilson?

A. 1165 Southwest 139.

(Testimony of Marion S. Wilson.)

Q. Are you employed?

A. By Lake Burien Heights.

Q. How long have you been employed by that organization?

A. Over six years.

Q. By whom are you employed?

A. By Lake Burien Heights.

Q. In what capacity?

A. Office Manager.

Q. Who is your immediate superior?

A. Mr. Brydon.

Q. What are your duties?

A. Well, directing the work of the office [329] girls, the other girls in the office, taking rents, rentals, tenant complaints, et cetera.

Q. And you have been employed in that capacity since before November 5 of 1952?

A. That is right.

Q. What, if any, method do you have with respect to handling requests from tenants for repairs or of mal conditions of one kind or another?

A. Just merely that when a call comes in, a form, work order form, is made out and put in the back room.

Q. By "in the back room", where do you mean?

A. The maintenance office.

Q. And who is that?

A. Well, under Mr. Suder's jurisdiction.

Q. It is placed on his desk, is it?

A. That is right.

Q. And each one of such calls for repairs or complaints of any nature are so handled?

(Testimony of Marion S. Wilson.)

A. Every call is written up.

Q. What is the situation with respect to the servicing of an area and the street and floodlights in the Lake Burien Heights Project and in the market area at the northeast corner of the project site?

A. It is taken care of by City Light. The [330] line service truck comes out every Monday and takes care of all the light, with which I provide them a list.

Q. Was that the practice on November 5 of 1952? A. Yes, it was.

Q. Do you have any record of the servicing of lights in the area in the project shown on Exhibit A-1?

Could you recognize the area of the project shown on that drawing, Mrs. Wilson?

A. Yes, I recognize it.

Q. Do you have a record of servicing of exterior lights, including the area lights, the street lights, and the floodlights in the market area, for the project during October and November of 1952?

A. Do I have a record?

Q. Yes.

A. I have a record, but there were no lights in that area replaced during that time.

Q. In other words, from your records and your examination of your records, it indicates there were no servicing of lights, et cetera, in October or November of 1952?

A. That is right. [331]

(Testimony of Marion S. Wilson.)

Q. Now, by whom was that servicing performed? A. City Light.

Q. And how frequently?

A. Every Monday morning.

Q. In what manner was that servicing of the lights accomplished?

A. Well, whoever the maintenance man was on duty, on Sunday night, he checked all the street lights, all the area lights, and left a list on my desk for Monday morning.

Q. By the "maintenance man on duty Sunday night", do you mean the night watchman?

A. On Sunday, up until nine o'clock, Mr. Chetkovs is not on duty. There is another man on duty.

Q. And it was his duty to check all of the lights in the area? A. That is right.

Q. And in the regular practice and regular business then that would be placed on your desk to be called to the attention of City Light?

A. That is right.

Q. And do you have here your records which you consulted and determined that there were no lights serviced in that area during those two months? [332]

A. The record that I have would be my desk calendar, where I put down the calls for City Light, designating the pole number of the light, and each month end when the bill came in from City Light, I had to identify that pole number on the monthly bill.

Q. Consequently, because of the practice fol-

(Testimony of Marion S. Wilson.)

lowed with respect to billing on those service calls, you had to be able to identify each and every light that was serviced? A. Yes.

Q. Did you, as office manager, receive a report of the accident to Mrs. Dooley which occurred on November 5, 1952? A. Not directly.

Q. How did notice of that accident first come to your attention?

A. Well, I heard it just in a casual conversation with another tenant.

Q. Do you recall when it was you first heard of it? A. Early in December.

Q. Do you know of anyone else in your office or on the staff who heard of that at any earlier date? A. No, they did not. [333]

Mr. Bateman: You may inquire.

Cross Examination

Q. (By Mr. Guimont): Mrs. Wilson, when you first heard of it, was Mrs. Dooley in the hospital?

A. I have no way of knowing.

Q. You did discuss the matter with Mrs. Dooley later, did you not?

A. Not until late in December—I think it was—I called her to ask the particulars. That was the first that I personally talked to Mrs. Dooley about it.

Q. And was she in a cast then?

A. I think she was.

Q. Now, do you know of other complaints you had of people injured in the area over the wires?

(Testimony of Marion S. Wilson.)

A. Only the report that ever came in to us.

Q. Was that a report you received from the beauty operator?

A. From the where?

Q. From the woman who was running the beauty shop

A. No. That was how I learned about Mrs. Dooley's accident.

Q. Was that report that you received notice of [334] another accident?

A. Much earlier than that. It was probably back when the fences were first up.

Q. Did you receive many complaints from the tenants with respect to these wires being down?

A. No. Occasionally, we did.

Q. And did you receive any complaints from visitors about it?

A. No, never from visitors, to my knowledge.

Q. Did you walk about the project yourself from time to time?

A. Yes.

Q. And in your walking through the project, did you yourself observe the fences down?

A. I think on one or two occasions, I did.

Q. And about when with respect to November 5, 1952?

A. I couldn't say.

Q. Was it before or after?

A. I couldn't say.

Mr. Guimont: I believe that will be all.

Redirect Examination

Q. (By Mr. Bateman): May I ask, Mrs. Wilson, have you ever had occasion to ascertain how

(Testimony of Marion S. Wilson.)

lowed with respect to billing on those service calls, you had to be able to identify each and every light that was serviced? A. Yes.

Q. Did you, as office manager, receive a report of the accident to Mrs. Dooley which occurred on November 5, 1952? A. Not directly.

Q. How did notice of that accident first come to your attention?

A. Well, I heard it just in a casual conversation with another tenant.

Q. Do you recall when it was you first heard of it? A. Early in December.

Q. Do you know of anyone else in your office or on the staff who heard of that at any earlier date? A. No, they did not. [333]

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Mr. Guimont: I believe that will be all.

Redirect Examination

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(Testimony of Marion S. Wilson.)

many children live in the [335] project area in the apartments?

A. Oh, yes; about once a year, we take a count. It usually runs between 650 and 700.

Q. Mrs. Wilson, do you yourself live in one of the apartments? A. Yes, I do.

Q. In the project? A. Yes.

Q. And you have occasion to come and go in the evening then many times?

A. Yes, quite frequently I do.

Q. Do you have any trouble seeing, as you pass along the sidewalks in the area?

A. No.

Mr. Bateman: No further questions.

Mr. Guimont: No questions.

The Court: Step down, please.

(Witness excused.)

The Court: Call the next witness.

Mr. Bateman: May it please the Court, the Defendants rest.

The Court: Any rebuttal?

Mr. Guimont: Just a few questions.

Mr. Bateman: May I interrupt the Court, please? [336]

May the several witnesses for the Defendants who have testified be excused, Mrs. Wilson, Mr. Suder, Mr. Brydon?

The Court: Any objection?

Mr. Guimont: No objection.

The Court: They are excused.

Now, you may proceed.

Mr. Guimont: Your Honor, there are two exhibits that we have identified that I would like to have admitted. I don't believe that there is any objection to Plaintiff's Exhibit 7.

Mr. Bateman: No objection.

The Court: It is now admitted.

(Plaintiffs' Exhibit 7 received in evidence.)

The Court: There is also a smaller one, a small photograph, Plaintiffs' Exhibit 1.

Mr. Guimont: No objection, your Honor.

Mr. Bateman: No objection, your Honor.

The Court: It is admitted.

(Plaintiffs' Exhibit 1 received in evidence.)

JEAN DOOLEY

upon being called as a rebuttal witness for and on her own behalf, and having been previously sworn, testified further as follows:

Direct Examination

Q. (By Mr. Guimont): Mrs. Dooley, do you recall whether you didn't make a report to Mrs. Wilson of your accident?

A. I recall the date, exactly. It was my first trip off the bed. It was two days after I returned home from the hospital, which would have been about eleven days past November 5.

Q. Would that be the 16th?

A. That would have been November 16.

Q. Now, was she aware then of the fact that you had an accident? A. Yes.

As I told her, she said, "I heard you fell down

(Testimony of Jean Dooley.)

the front steps." I corrected her there. She called me back in about two hours and said she had to make out an official accident report, and give all the details.

Q. And you gave them to her?

A. Yes, the time of day and all the particulars.

Q. Now, did you go out to the project last evening [338] and, at the area where you fell, check the lighting facilities?

A. Yes, I went last night. I was curious about the floodlights which were mentioned which I had never before observed, and I had observed this spot at night on several other occasions.

Q. Did you observe those lights last night, floodlights?

A. There were supposedly some floodlights attached to the building, the back of the grocery stores, the buildings there, the shopping center, and if they were there, they weren't on, but it was dark, and I couldn't see if there were any there, and then there were a pair of twin floodlights so far away over at Anbaum Road, and the light just didn't affect this spot at all.

Q. Did you observe last night the visibility emanating from the light that is attached to the building west of your building and where you used to live?

A. Yes, I did. There wasn't adequate light there, —although, last night the situation there was lighter than it was the night I fell, but there was bedroom windows about ten feet from this spot,

(Testimony of Jean Dooley.)

and the lights there happened to be on, and also the light coming from a basement across the other side of the walk [339] happened to be on, which weren't on that particular night, so I really couldn't estimate that.

Q. The walkway area, is it obscured by any shadow?

A. Yes. There is a shadow of this wire fence. It makes a lacework pattern. It is a chain-like fence, is what it is. I would call it that. It makes a lacework pattern on about four-fifths of the walk, and then the rail that is on top—I don't know how big that is in size,—but it magnifies the shadow on about six inches across the walk.

Q. Was that shadow approximately where you fell?

A. Approximately, yes.

Mr. Guimont: I believe that will be all.

Cross Examination

Q. (By Mr. Bateman): Mrs. Dooley, the first shadow you referred to as being four-fifths, covering four-fifths of the sidewalk?

A. Yes, coming from, it was the main sidewalk, the one going north and south.

Q. The north and south sidewalk?

A. Yes.

Q. Well, now, that is not the sidewalk you [340] were walking on, is it?

A. I had either approached the spot, or was about to. I have never been sure just about the spot I was there.

(Testimony of Jean Dooley.)

Q. But you stumbled, I think you said, about two large steps before you came opposite that telephone pole, did you not?

A. I don't recall that.

Q. Isn't that what you testified to?

A. I don't recall having said it. I was in the middle of the sidewalk and I did stumble a few times before I fell, but I don't think I have ever been able—I don't think I have ever been clear as to the exact spot. I have always said, "approximately", because, to this day, I don't know the exact spot. It was in the middle of the sidewalk at the corner. And the "approximate" couldn't vary more than a foot.

Q. Well, then, you don't know whether you stumbled in this shadow cast by a rail, did you call it?

A. I don't know that I stumbled in the shadow. I don't know that this particular light was on to make a shadow the night I fell.

Q. Did you just testify that you thought that where that rail cast a shadow was about where you fell? [341]

A. Approximately the spot where I fell.

Q. But now, you state that you can't say within two large steps whether you fell to one side of that pole or to the other?

A. I fell on the corner, where the sidewalk makes its turn, I fell there.

Q. Now, didn't you testify yesterday that you

(Testimony of Jean Dooley.)

stumbled about two large steps before reaching that telephone pole?

A. I don't know how the pole entered into it, but I stumbled a couple of times before I fell. But I was aware I was going to fall.

Q. Now, the first time you stumbled, it was because you had contacted something?

A. I felt myself entangled in wire.

Q. Were you turning then? A. No.

Q. You weren't turning then when you first stumbled?

A. I was walking rapidly, and I was—oh, do you mean, was I turning a corner yet?

I have never been sure as to that. Either I was going to in the next step, or was in the process of—I don't know.

Q. You don't know whether you were turning [342] or not, then?

A. Either, I would have within the next step, or I had. I couldn't say.

Q. Well, if you stumbled two large steps to the east of the telephone pole, and were in the act of turning, then you were turning about four or five feet short of the corner, were you not?

A. No. I wasn't. I don't know that I was turning. I mean, what you are saying—I am trying to be cooperative, but I really don't know how to answer that. As I have stated, many times before, I was either going to turn the corner, or was in the process of making that step to turn it, when I stumbled a couple of times and fell. I can't re-

(Testimony of Jean Dooley.)

member that. I was in great pain, and it happened so quickly I couldn't show you the exact spot.

Q. Well, within what limits, within how many feet or how many inches, can you place the spot along the sidewalk where you first stumbled?

A. Well, where I first stumbled was just slightly before I reached the corner to turn. I mean, where I first felt the wire.

Q. Now, how—can you place it within four or five feet of where you stumbled first?

A. Probably. [343]

Q. Well, now, then, will you attempt to do so?

A. Probably. I will try it.

Q. In words?

A. Well, would you repeat the question?

Q. Would you tell me where you were on the sidewalk when you first stumbled on the evening of November 5, 1952?

A. Well, I stumbled. I was still on the sidewalk that goes east and west, and either proceeding to turn the corner that will take me north and south——

Q. I am asking you where you were at the time you first stumbled?

The Court: I think it might be helpful if you put in the question the phrase relating to some object which you think she is familiar with.

Q. (By Mr. Bateman): Mrs. Dooley, you have testified now that you were still on the sidewalk which goes in a generally easterly and westerly direction?

(Testimony of Jean Dooley.)

A. Yes. I was probably alongside the telephone pole.

Q. Well, now, didn't you state yesterday that you stumbled before you reached the telephone pole?

A. No. I stated—I think I stated that I [344] couldn't touch the telephone pole.

Mr. Bateman: May I see Exhibit 1, Plaintiffs' Exhibit 1? It is the large drawing. That is the one that I am interested in.

(Document handed to Mr. Bateman.)

The Court: Let the record show what counsel is looking at.

Mr. Bateman: I am looking at Plaintiffs' Exhibit 5, your Honor. Would you show that to the witness, Mr. Bailiff?

(Plaintiffs' Exhibit 5 handed to the witness.)

Q. (By Mr. Bateman): Mrs. Dooley, do you recall indicating on that drawing where it was you first stumbled? A. Yes.

Q. How did you make that indication?

A. Well, there are two marks here very close together, and as I have said many times, I don't know.

Q. Well, what marks did you place on there?

A. Well, there is a red "X" mark with my initial "J". There is also the numeral "1".

Q. And what was that to indicate?

A. Well, they are so close together, that I wouldn't know, but that is the spot where I began to stumble. [345]

(Testimony of Jean Dooley.)

Q. Well, would you tell me then from that mark where it is that you indicated you first stumbled?

A. Well, the figure "1", I would say.

Q. Where the figure "1" indicates?

A. Yes, or the "X". They are right on each other.

The Court: I ask you to have her state for the record, or give her an opportunity to state in the record, in words, where it was in reference to something.

Q. (By Mr. Bateman): Will you tell me, then, how many feet you were—give me your estimate of how many feet you were east or west of the telephone pole which is shown on that drawing, and in the several pictures.

The Court: At the time of the occurrence of the events stated in the last answer?

Mr. Bateman: Yes, your Honor, at the time she fell when she first stumbled.

A. (Looking at exhibit) If I knew which way east and west was, I could answer that better.

Q. (By Mr. Bateman): Calling your attention to the direction arrows shown on the exhibit, direction notation shown on [346] the left side of the exhibit, Mrs. Dooley, can you orient yourself as to directions on the drawing from that, on the left side?

The Court: You might ask her if she understands the direction towards which the arrow points so that you can verify her understanding of at least what is on the map.

(Testimony of Jean Dooley.)

Q. (By Mr. Bateman): Have you noticed on the exhibit the direction indicator on the left-hand side of the exhibit? A. Yes.

Q. And that indicates "north" to be in which direction? A. To the right.

Q. To the right side of the drawing?

A. That is right.

Q. And "east" would be to the bottom or lower edge of the drawing?

A. Or towards me, yes.

Q. Now, you have located the telephone pole that is situated in the corner of that grass area?

A. Yes, I have.

Q. Now, will you describe, or state, how far in your opinion you were east or west of that telephone pole on the sidewalk running easterly and westerly at [347] the time that you first stumbled?

A. Four feet.

The pole would be four feet further to the north, and about one foot further to the west from the point where I began to stumble.

Q. Then, considering your line of travel, you testified that you had about a foot to go, yet before you came to a point on the walk opposite the telephone pole?

A. No. I don't know what I said, and from this, I am not very good at blueprints. I do know how it happened. I am thoroughly aware of how it happened.

Q. Well, would you tell me, is that correct then, —is that your testimony that you were about a foot

(Testimony of Jean Dooley.)

from reaching a point opposite the telephone pole at the time you first stumbled?

A. And it would be to my north.

Q. Now, Mrs. Dooley, you were walking along the sidewalk in a westerly direction, weren't you?

A. Yes.

Q. And you had walked some 25 or 30 feet along that sidewalk, had you not, before you stumbled? A. I guess——

Q. Approximately? [348] A. Yes.

Q. And you were walking in a westerly direction? A. Yes.

Q. And you were approaching the point on that sidewalk opposite the telephone pole in the corner. Now, is it your testimony that you stumbled approximately one foot before reaching that point on the sidewalk opposite the telephone pole?

A. I think possibly I began to stumble there and maybe made—I didn't make a complete turn. I am not exactly sure of just the next step, what happened then. I was frightened. I knew I was going to fall, and I fell. The telephone pole was to my right, the north, at the time.

Q. And you were walking rapidly then?

A. Yes, I was.

Q. And when you came to a stop, you were within an arm's reach of the telephone pole?

A. No. I couldn't reach it. I could almost. I couldn't reach it, because I had contemplated pulling myself up on it.

Q. Did you reach within six inches of it?

(Testimony of Jean Dooley.)

A. I don't think so. I think two feet, probably.

Q. Were you still on the sidewalk area?

A. Actually, I was rolling and crying. I wasn't in one spot too long.

Q. Well, at any rate, on the sidewalk a foot to the east of the point on the walk immediately opposite that telephone pole, there was no shadow, was there, when you looked last night?

A. To the east of the telephone pole, no. The wire fence didn't make the shadow there.

Q. There was no shadow there?

A. Not in that spot, no.

Mr. Bateman: No further questions.

Mr. Guimont: No further questions.

The Court: I do not see what disposition is made of Plaintiffs' Exhibit 8, which I suspect may be a duplicate of Plaintiffs' Exhibit 1. It is something that was marked, or I have it as marked, and denominated somewhat similarly to what has been admitted.

Is it a duplicate of what has been admitted as Plaintiffs' Exhibit 1?

Mr. Bateman: We have no objection to its admission.

Mr. Guimont: It is just about the same picture.

The Court: Do you offer it in evidence? [350]

Mr. Guimont: We offer it in evidence.

The Court: Is there any objection?

Mr. Bateman: No objection, your Honor.

The Court: Plaintiffs' Exhibit No. 8 is now admitted.

(Plaintiffs' Exhibit 8 received in evidence.)

The Court: Call the next witness.

Mr. Guimont: We rest, your Honor.

The Court: The Plaintiff rests.

Is there any sur-rebuttal?

Mr. Bateman: No, your Honor.

The Court: Do the Defendants rest?

Mr. Bateman: The Defendants rest.

The Court: How much time do counsel wish to argue this on each side of this case on the merits?

Mr. Guimont: Fifteen minutes, your Honor.

The Court: Well, that is a pretty short time, I think, especially for one who might want to divide his argument into an opening and closing argument.

Mr. Bateman: I should like, if the Court please, somewhat longer. I should like to argue the law somewhat as well as the evidence.

The Court: Well, I think it is the law of negligence, isn't it? [351]

It is a question of fact as to whether the Defendant was negligent, and that caused the damages related here.

Each case is pretty much its own law, is it not, as to what constitutes negligence, and whether or not the facts and the surrounding—

Mr. Bateman: Well, there is a further aspect, I believe, of this question, your Honor, and that pertains to the status of the party. There is the question of the right and propriety of the defendants in maintaining the fences.

The Court: How much time do you think you ought to have?

Mr. Bateman: I should like, your Honor, to have a half hour to 35 minutes.

The Court: Each side is given thirty minutes, and the Plaintiffs' argument may be divided between opening and closing arguments in any manner Plaintiffs' counsel wishes, and we will have the arguments in the morning.

Mr. Guimont: In the morning?

The Court: Yes. We will begin at ten o'clock tomorrow morning. Court is now adjourned until that time.

(At 5:00 o'clock p.m., Thursday, March [352] 11, 1954, proceedings recessed until 10:00 o'clock a.m. Friday, March 12, 1954.)

Seattle, Wash., March 12, 1954, 10:00 o'clock a.m.

The Court: I wish to hear counsel in the argument on the Dooley matter now.

(Arguments made by counsel on behalf of Plaintiffs and Defendants.)

The Court: From a preponderance of the evidence in this case, the Court finds, concludes and decides as follows:

That the plaintiffs have sustained the burden of proof as to each and all of the material allegations of their complaint concerning the alleged negligence of the defendants and the alleged due and reasonable care on the part of the plaintiff wife, Mrs. Jean Dooley;

That, in particular, the defendants were negligent in failing to maintain the sidewalk in a reasonably safe condition and in failure to exercise reasonable care in providing assistants whose duty it was to keep the condition of the sidewalk reasonably [353] safe at all times material to this action;

That the Court does not believe that there is a convincing showing or a showing by a preponderance of the evidence or any showing at all on the part of the defendants or anyone else in this case that a particular individual did actually make or that any individual acting for or on behalf of the defendants made an inspection of the premises near the place of the accident between the time the defendants' employee Dykeman ended his day's work and the time of the occurrence of this accident;

That the accident occurred while the plaintiff, Jean Dooley, was walking in a hurry along and on the surface of the sidewalk when loose and disarranged fencing wire or barricade fencing wire was in a loosened and strewn condition upon the surface of the sidewalk where the plaintiff Jean Dooley then was, as of right, walking;

The Court makes that finding notwithstanding the testimony of Dr. Ruuska regarding the detail of what he understood plaintiff stated to him in connection with her relating to the Doctor the history of the occurrence of the accident;

That, as the fact-trier in this case having during the trial applied all known tests which a fact-trier [354] may properly apply on the question of cred-

ibility and weight of testimony and truthfulness of witnesses, I do not find anything at all in the testimony of that party, Mrs. Jean Dooley, while she was on the witness stand as a witness either in the story of the events connected with the accident related by her or in her manner of testifying, which in any way causes the Court to believe or suspect that she was not telling the truth on the witness stand, and I believe she then did tell the truth;

That it might be observed, I think fairly, that sometimes Doctors on writing down the case history given to them by their patients may not have time for and may not take the trouble to record with particularity each and every detail of the story which was or, after further interrogation, might have been related to them by the patient. It is possible that Mrs. Dooley, the plaintiff wife in this action, might have said in a general way in response to some question of the Doctor that this was a wire among those stretched as barricade wires between stakes, without thereby tending to contradict the more essential factual detail, stated by her on the witness stand, during the trial, that the wire at the time she was walking along the sidewalk was then and there in a strewn [355] condition along and upon that sidewalk where she was walking;

That the Court finds, concludes and decides from a preponderance of the evidence that the plaintiff Jean Dooley was exercising due and ordinary care for her own safety and was not guilty of contribu-

tory negligence at the time of the accident. This Court finds notwithstanding the fact that she frankly said she was walking in a hurry without any particular reason in her mind compelling that hurry, but the duty of the defendants to maintain this sidewalk in a reasonably careful manner and in a reasonably careful and safe condition for use by persons does not exclude persons walking in a hurry. When they are exercising reasonable care for their own safety includes those in a hurry as well as those not walking in a hurry. Persons in the ordinary course of life's activities frequently use sidewalks while walking in a hurry as well as when walking not in a hurry, and in using sidewalks while walking in a hurry, they are not by reason of the hurrying in and of itself failing to exercise due and ordinary care for their own safety;

That the personal injuries and damages as alleged in plaintiffs' complaint to have been sustained by the plaintiff Jean Dooley were in fact [356] sustained and proximately resulted from the negligence of the defendants;

That considering the extent of the physical injuries to the knee and kneecap of the plaintiff Jean Dooley and the medical history of her condition following the injury, the length of the time her leg was in a cast, the length of time she had the health symptoms in relationship to the unborn child with which she was concerned during the time, considering the generally successful results of the surgery in respect to reduction of the frac-

ture of the kneecap, considering the roughened surface which is said to be present now on the underside of the kneecap, considering the atrophy in the muscles of the leg on which the fractured kneecap was, considering the direct physical injuries and damages sustained by the plaintiff Jean Dooley to the kneecap, knee joint and leg, and considering the medical expenses, hospital bills and medicines already incurred and those which reasonably will be incurred as a proximate cause of the accident here involved, considering the necessity which the plaintiff experienced in having assistance in their home work and the reasonableness of the cost thereof, in which connection the Court has in mind the assistance rendered by Mrs. Dorothy Dooley, the mother-in-law of the [357] plaintiff Jean Dooley and the mother of plaintiff Richard Dooley, considering each and all of the injuries and damages proximately resulting to plaintiffs from the defendants' negligence as alleged in this action, considering each and all of the foregoing items specifically discussed and all of the evidence and arguments received by the Court relating thereto, the Court does find, conclude and decide that plaintiffs are entitled to recover of and from the defendants and each and all of them the total sum of Five Thousand Dollars (\$5,000.00) together with plaintiffs' taxable costs herein to be taxed in plaintiffs' favor against the defendants.

When would counsel like to meet with the Court to settle and enter proper findings of fact and conclusions of law and judgment in this matter?

Mr. Guimont: Could we do that next week, your Honor?

The Court: Could you do it on Wednesday, the 17th, at 11:00 o'clock in the forenoon?

Mr. Guimont: Your Honor, I have a divorce trial.

The Court: Can you do it on Thursday, the 18th, at 10:00 o'clock in the forenoon?

Mr. Guimont: Yes, your Honor. [358]

Mr. Bateman: May it please the Court, I plan to be in Aberdeen that day to take depositions.

The Court: Can you do it on Friday, the 19th?

Mr. Bateman: I believe that will be satisfactory.

Mr. Guimont: I can do it, also.

The Court: Mr. Cushman, is that agreeable to you?

Mr. Cushman: Yes, your Honor.

The Court: This matter is continued until Friday, March 19th, at 10:00 o'clock in the forenoon for the purposes mentioned.

Is there any issue in this case necessary to final disposition thereof not disposed of already by the Court's tentatively announced oral decision just announced?

Mr. Guimont: The only matter may be that this is a tort claims action against the United States as well as——

The Court: You mean the attorneys' fees?

Mr. Guimont: Yes, I didn't know——

The Court: Well, of course, that should be determined by the Court, but any award made for attorneys' fees must, by statutory requirement, be

paid out of the total recovery of the kind just orally announced in this case. [359]

Mr. Guimont: Yes, I understand that, your Honor.

The Court: It cannot be in addition to that sum. In that connection do you think your clients would be willing to make a statement as to what amount or what percentage would be proper for the Court to allow the plaintiffs' counsel in this case? You may discuss it with your clients if you wish, or if there is something else you wish to discuss with counsel in the case about this matter of fixing plaintiffs' attorneys' fees, you may do that.

Mr. Guimont: If I may do that, your Honor.

(At this time, Mr. Guimont conferred briefly with Plaintiffs.)

The Court: Mr. Bateman, if you think there is some other issue not disposed of by the Court's oral decision tentatively announced, you will be given an opportunity to discuss it after Mr. Guimont has finished.

Mr. Guimont: Your Honor, in that matter, the statute I believe provides for a maximum of twenty per cent of the recovery, and my clients indicate that that will be satisfactory.

The Court: I ask Mr. Dooley and his wife, Mrs. Jean Dooley, do you approve of the Court's awarding [360] to Mr. Guimont out of this recovery just announced; if that is the recovery finally passed into judgment by the Court, is it agreeable to each of the plaintiffs that the Court award out of that principal sum of Five Thousand Dollars (\$5,000.00)

twenty per cent thereof for Mr. Guimont's attorneys' fees in this case?

Mrs. Dooley: That is agreeable.

Mr. Dooley: That is agreeable.

The Court: Mr. Guimont, do you think that you have earned twenty per cent in this case?

Mr. Guimont: Your Honor, I feel that I have. It is a contingency case, Your Honor, and we have been two and a half days in trial. There was considerable preparation in advance of trial, and I feel that that would be a fair fee, a reasonable fee.

The Court: Does anyone connected with the case have a different thought? Does any other person have a different thought about what would be reasonable for the plaintiffs as a reasonable attorneys' fee as an allowance to plaintiffs' attorneys to be paid out of the judgment?

(No reply.)

The Court: The Court then finds, concludes and decides that twenty per cent of the Five Thousand Dollars, if that is entered in the judgment finally [361] would be, and is, a reasonable sum to be awarded, and the Court does award that sum as plaintiffs' attorneys' fees, which attorneys' fees in said amount shall be paid out of the principal recovery to be allowed by the Court as entered in the judgment in this case.

Mr. Guimont: Thank you, your Honor.

The Court: Mr. Bateman, do you think there is any material issue presented by the pleadings in this case which has not been disposed of by the Court's tentatively announced oral decision?

Mr. Bateman: I know of none at this time, your Honor.

The Court: The Court is now in recess until two o'clock and those connected with this trial are excused until the date previously announced, which is to be next week.

(At 12:00 o'clock noon, Friday, March 12, 1954, trial proceedings concluded.) [362]

[Endorsed]: Filed May 25, 1954.

[Endorsed]: No. 14,390. United States Court of Appeals for the Ninth Circuit. United States of America, and Carroll, Hedlund & Associates, Inc., a Washington Corporation, Appellants, vs. Richard E. Dooley, and Jean Dooley, his wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: June 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14390

UNITED STATES OF AMERICA, and CAR-
ROLL, HEDLUND & ASSOCIATES, INC.,
a Washington corporation, Appellants,

vs.

RICHARD E. DOOLEY and JEAN DOOLEY,
his wife, Appellees.

APPELLANTS' ADOPTION OF POINTS ON
APPEAL, FILED IN THE UNITED STATES
DISTRICT COURT

Come now United States of America and Car-
roll, Hedlund & Associates, Inc., a Washington cor-
poration, appellants herein, and adopt for appel-
lants' statement of points on appeal, the Statement
of Points on Appeal filed by appellants in the
United States District Court, document number 25,
Original Certified Record.

/s/ A. T. BATEMAN,

Of Brethorst, Fowler, Dewar, Bate-
man & Reed

/s/ F. N. CUSHMAN,

Assistant U. S. Attorney,
Attorneys for Appellants

[Endorsed]: Filed June 17, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPLICATION FOR PERMISSION TO DIS-
PENSE WITH PRINTING OF EXHIBITS
AND FOR CONSIDERATION THEREOF
IN ORIGINAL FORM

Come now the appellants, United States of America and Carroll, Hedlund & Associates, Inc., a Washington corporation, and apply to the Court for permission to dispense with printing of the following exhibits:

Plaintiffs' (appellees herein) Exhibits 1, 5, 7 and 8; Defendants' (appellants herein) Exhibits A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10, A-11, A-12 and A-16; and request that said exhibits be considered by the Court in their original form.

/s/ A. T. BATEMAN,

Of Brethorst, Fowler, Dewar, Bate-
man & Reed

/s/ F. N. CUSHMAN,

Assistant U. S. Attorney,
Attorneys for Appellants

State of Washington,
County of King—ss.

A. T. Bateman, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys herein for the appellants and makes this affidavit in support of appellants' application for permission to dispense with printing of certain of the exhibits herein and

for consideration of said exhibits in their original form.

That plaintiffs' (appellees herein) Exhibits 1, 7 and 8 are photographs and appellees' Exhibit 5 is a scale drawing or diagram. That defendants' (appellants herein) Exhibits A-1 and A-2 are scale drawings or diagrams, and that defendants' (appellants herein) Exhibits A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10, A-11 and A-12 are photographs. That defendants' (appellants herein) Exhibit A-16 is a wire specimen. That said exhibits are not of a printable type.

/s/ A. T. BATEMAN

Subscribed and sworn to before me this 12th day of June, 1954.

[Seal] /s/ RICHARD C. REED,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed June 17, 1954. Paul P. O'Brien,
Clerk.

No. 14390

IN THE
**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND
& ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPELLANTS' BRIEF

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FILED

SEP 3 1954

PAUL P. O'BRIEN
CLERK

No. 14390

IN THE
**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND
& ASSOCIATES, INC., a Washington Corporation,
Appellants,

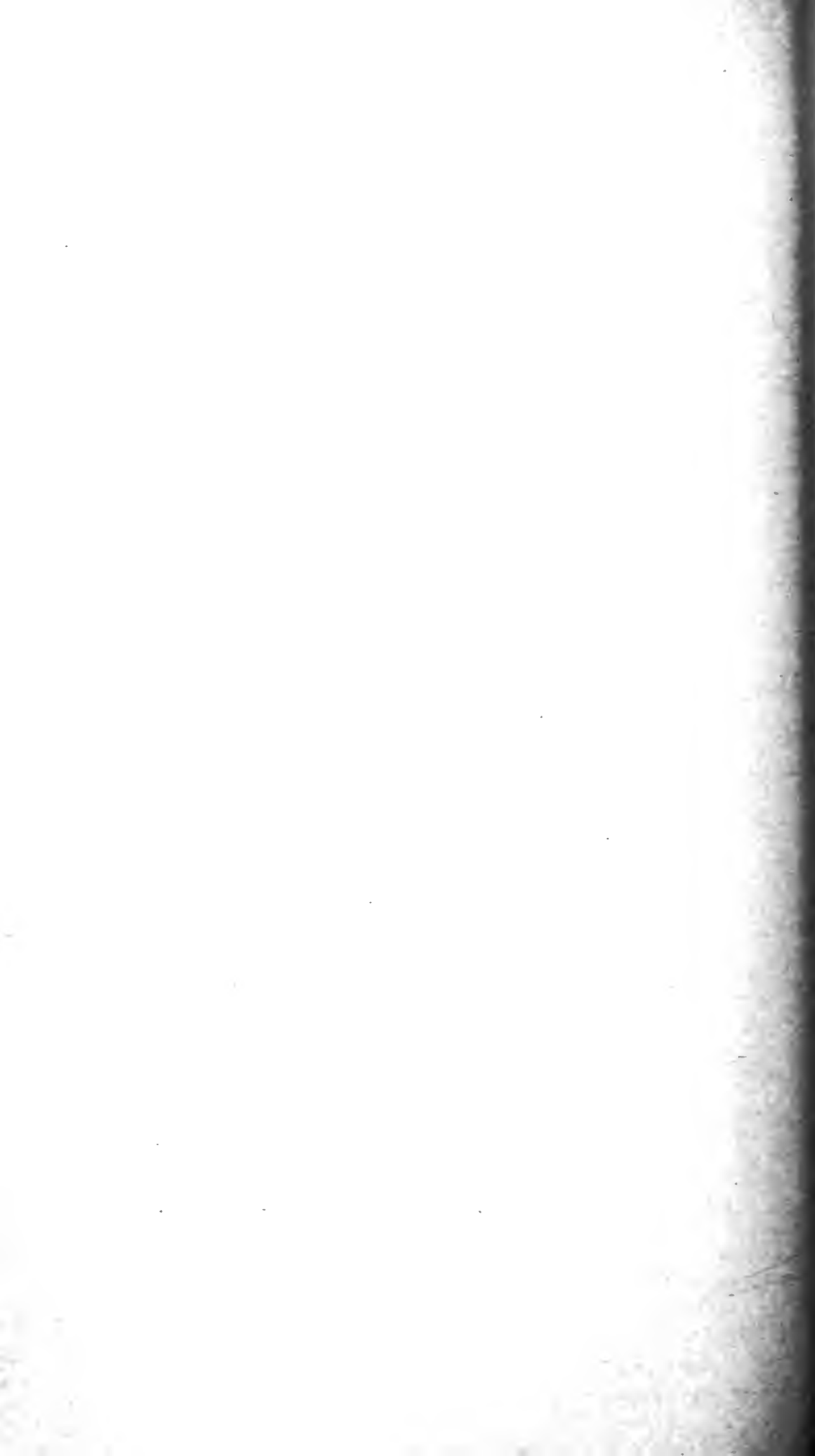
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RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
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APPELLANTS' BRIEF

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No. 14390

IN THE
**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND
& ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPELLANTS' BRIEF

I. JURISDICTIONAL STATEMENT

This case is before the Court upon the appeal of the United States of America and Carroll, Hedlund & Associates, Inc., a Washington Corporation, who were defendants in the District Court, from the judgment of the United States District Court for the Western District of Washington, Northern Division, against the appellants entered March 26, 1954 (R. 16-17).

The jurisdiction of the District Court was based

upon the Federal Tort Claims Act of August 2, 1946, Ch. 753, Title 4, Part 3, § 410, 28 U.S.C., § 931. (28 U.S.C.A. §§ 7346(b), 1402, 2402, 2411, 2412, 2671, 2674, 2675, 2676).

The jurisdiction of this Court is sustained by the Judiciary and Judicial Procedure Code, Ch. 646 (62 Stat. 929, 65 Stat. 726, 28 U.S.C.A. § 1291; and 62 Stat. 930, 65 Stat. 727, 28 U.S.C.A. § 1294(1)).

The action was brought in the District Court on a claim against the United States of America to recover money damages for personal injuries alleged to have been caused by the negligence of the Federal Housing Administration, an agency of the United States of America, and Carroll, Hedlund & Associates, Inc., a Washington corporation, its agent, as more particularly appears from the Complaint, paragraphs I-XI (R. 3-8).

Pursuant to Rule 73 of the Federal Rules of Civil Procedure, the appellants filed on May 10, 1954, Notice of Appeal from the judgment of the District Court (R. 22), within sixty days from the entry of said Judgment (R. 16), and within thirty days from the entry of Order Denying Motion for New Trial and Order Denying Motion for Amendment of Findings (R. 21-22), which motions had been timely filed by appellants on April 2, 1954 (R. 17-21).

II. STATEMENT OF THE CASE

The Lake Burien Heights Apartment Project is a large garden-type apartment project, comprising 44 apartment buildings, containing 554 dwelling units, a nursery school, community center and playfield, and covering an area of approximately 35 acres (R. 157-158, 250). Since August of 1950 this apartment project has been owned by the Federal Housing Administrator for the United States of America, and since acquisition by the Government has been managed by Carroll, Hedlund & Associates, Inc., a Washington corporation, as agent for the Federal Housing Administration under the supervision of the Chief Property Manager for the Federal Housing Administration at Seattle (R. 161-162). During the year 1952 the Federal Housing Administration for the United States Government carried out an extensive landscaping improvement program on the project by way of the establishment of extensive lawns and plantings for the beautification of the areas between the apartment buildings. The work was done by Miller-Hansen, Landscape Contractors (R. 159). Some 130,000 square feet of lawns were installed throughout the project site (R. 219). Through the accomplishment of this program the areas between the buildings in the project became beautiful, pleasing to the eye, clean and safe (R. 159, 221; defendants' Ex. A-11, A-12, R.

180, 221). To protect these plantings and the lawn areas, fences were erected around the newly seeded plots to deflect pedestrian traffic and to keep tenants and others off of the newly seeded areas (R. 97-98, 223-224, 231-232, 240, 245-246). These fences consisted in general of upright posts of 1"x4" or 2"x4" material, placed approximately 8' apart, with a single strand of wire (defendants' Ex. A-16, R. 282), strung between the uprights approximately 18" to 24" above the ground (R. 220, 240). These were installed along the various walks and streets adjacent to the newly seeded areas in a position from 4" to 16" back from the edge of the walk or street, depending upon the circumstances (R. 220, 283). During the performance by Miller-Hansen of the landscaping work these fences were maintained by that firm (R. 224). In July of 1952 this contract work was completed and the task of caring for the newly seeded lawns and the newly planted areas and the maintenance of the protective fences was turned over to the United States Government upon its acceptance of the contract work (R. 224-225). This maintenance work was carried on under the supervision of the Federal Housing Administration by Carroll, Hedlund & Associates, Inc. (R. 224-225). The extent and nature of the program followed for the maintenance of the protective fences is discussed in detail in the Argument section herein (see pp. 26-29).

From June of 1952, and continuously through the time of trial, the appellees were tenants, occupying one of the apartments in the Lake Burien Heights Apartment Project (R. 96). On November 5, 1952, the appellee Jean Dooley (hereinafter referred to as "appellee") left the appellees' apartment at approximately 5:45 P.M., intending to go to the meat market at the community shopping center (R. 120). The location of appellees' apartment and of the shopping center is shown on plaintiffs' Ex. 5 (R. 89-90, 94-95). For reasons of her personal convenience (R. 141) she left the apartment building by the rear or basement exit at the back of the building and proceeded through the drying yard adjacent to that exit and, the court found, along a concrete walk adjacent to the apartment building (R. 141, Plaintiffs' Ex. 5). As she was walking hurriedly along said walk she tripped and fell over a wire which was disarranged from the wire fence adjacent to the walk and had fallen upon the surface of the walk, the court found (R. 13, 120-122).

This action was instituted in the Federal District Court to recover damages for the injuries sustained by the appellee as the result of that fall. In their complaint the appellees charged the appellants were negligent in permitting said wire to remain on the sidewalk when the appellants knew, or in the exer-

cise of reasonable care should have known, that the tenants of the apartment used the same, in failing to remove the wire after having been notified that it existed as an obstruction on said walk, and in failing to furnish proper lighting to light the sidewalk (R. 5-6). At the conclusion of the trial the District Court announced its oral decision in favor of the appellees (R. 307, 311). Subsequently the Court entered written Findings of Fact and Conclusions of Law (R. 11-16). The appellants objected to these Findings (R. 10-11) and interposed Motion to Vacate Judgment and for new trial (R. 19) and Motion for Amendment of the Findings of Fact, Conclusions of Law and Judgment (R. 17-19). The Court entered its Judgment in favor of the appellees and against each of the appellants (R. 16).

On this appeal there may be excluded from consideration several of the factual issues which were involved in the trial, and to which a considerable portion of the testimony of the witnesses related. One such issue was the place where appellee fell. Her testimony was uncorroborated on this point and was contrary to the report of her doctor that she had stated to him that she had tripped over a wire stretched tightly between two stakes (R. 82). Circumstantially her testimony was impeached by the fact that in her injured condition she sought assistance at a neighbor's window, which was more

remote from the place she testified the accident occurred than the window of the room of her ground floor apartment in which her husband then was, and also which neighbor's window was likewise closer to the spot where the line of a direct route from her place of exit from the building and drying yard to the meat market intersected the protective fence than was the window of appellees' apartment. (Plaintiffs' Ex. 5, Defendants' Ex. A-1, A-2; R. 179-180). Notwithstanding the Court found that the appellees had sustained the burden of proof on this factual issue (R. 308). It is not contended on this appeal that such finding, being based on conflicting evidence, is reviewable. Similarly, the appellants are not asking for review of the Findings of the District Court on the issues of contributory negligence and damages. Finally, the District Court by making no finding thereon, held in favor of the appellants on the issue of the adequacy of the lighting provided by the appellants in the area where the accident occurred, and that charge of negligence is not in issue on this appeal.

Questions Involved

The sole broad question involved on this appeal is as follows:

Was there any evidence whatsoever to sustain or warrant the finding by the District Court that the

United States of America or Carroll, Hedlund & Associates, Inc., or either of them, had actual or constructive notice of the presence of said wire upon the walk prior to the accident?

Such is the principal question involved herein, because in order to impose liability for an injury to an invitee by reason of a dangerous condition of the premises it must be shown that the condition has either been brought to the attention of the owner or occupant of the property or that such condition has existed for such time as would have afforded him sufficient opportunity, in the exercise of reasonable care, to have become cognizant of and removed the danger. (See Argument pp. 14-25). The question has been raised by appellants' Statement of Points on Appeal filed in the District Court (R. 24-28) and appellants' adoption thereof, which was filed herein (R. 316), as well as by appellants' objections to the proposed findings (R. 10-11), Motion to vacate the Judgment and for New Trial (R. 19), Motion for Amendment of Findings, Conclusions and Judgment (R. 17-19). In appellants' Statement of Points on Appeal (R. 24-28) specification was made to the various particulars wherein appellants urged the District Court erred, each of which in substance involved the question hereinabove stated.

III. SPECIFICATIONS OF ERROR

1. The United States District Court erred in denying appellants' motion made at the close of the plaintiffs' case after the plaintiffs had rested, to dismiss the Complaint for want of evidence sufficient to sustain a cause of action against the appellants, or either of them, for the reason that there was no evidence adduced by the appellees that the appellants, or either of them, were guilty of negligence proximately causing appellee's injury in maintaining said wire barricade, in that there was no evidence that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk (R. 156).

2. The United States District Court erred in making paragraph VI of its Findings of Fact (R. 13-14) in finding therein that said wire was permitted by appellants to obstruct the sidewalk, and in finding therein that appellee tripped over said wire as the result of the appellants' negligence in maintaining the wire barricade, for the reason that in such respects said findings are clearly erroneous and unwarranted and there was an entire absence of evidence to sustain the same in that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

3. The United States District Court erred in making paragraph VIII of its Findings of Fact (R. 14) in finding therein that the appellants, or either of them, were negligent in failing to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk and in failing to remove the wire therefrom after having knowledge, or in the exercise of reasonable care should have had knowledge, that said dangerous obstruction existed upon said sidewalk, and in finding that said negligence of the appellants was a direct, proximate and concurring cause of appellee's injury and damage; for the reason that in such respects said findings are clearly erroneous and unwarranted and there was an entire absence of evidence to sustain the same in that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

4. The United States District Court erred in making paragraph IX of its Findings of Fact (R. 14) in finding therein that the appellee's injuries and damages were the direct and proximate result of the negligence of the appellants, for the reason that in such respects said findings are clearly erroneous and unwarranted and there was an entire absence

of evidence to sustain the same for the reason that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

5. The United States District Court erred in entering Conclusion of Law paragraph I (R. 15), in concluding therein that the appellees were entitled to judgment against the appellants, or either of them, in that said Conclusion of Law (R. 15) is contrary to the evidence and to the law, for the reason that there was an entire absence of evidence to sustain the same for the reason that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

6. The United States District Court erred in denying appellants' Motion to Vacate and Set Aside the Judgment and Grant a New Trial (R. 19-22) for the reasons that there was an insufficiency of and an entire absence of any evidence to show: that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire on the walk; negligence on the part of the appellants in maintaining said wire barricade and that any such negligence was a proximate cause of the appellee's injury. In the ab-

sence of such evidence the court committed error of law in entering judgment for appellees.

7. The United States District Court erred in denying appellants' Motion for Amendment of Findings of Fact and of the conclusions of law and judgment to conform with the Findings as amended (R. 17-19, 21-22), for the reasons that paragraphs VI, VIII and IX (R. 13-15) of the Findings of the Court were clearly erroneous and unwarranted and without any evidence to sustain the same in the respects hereinabove set forth in Specifications 2, 3 and 4; that the amendments to said findings as proposed in said motion were in conformity with all of the evidence in the case, and there was no evidence to sustain any finding of fact contrary thereto in the particular respect that the same contained no finding of fact that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the existence of said wire on said walk, and in the further respect that the proposed amendment to paragraph VIII states that the presence or condition of said wire on said walk was not brought to the attention of appellants, or either of them, nor was it shown how long that said wire was there, which requested finding of fact is essential to a determination of the issues in the case and is the only finding on such issue which is sustained by the evidence.

IV. ARGUMENT

Summary of Argument

The errors which are urged by appellants in each of the specifications of error set forth above turn upon the same issue of law and upon the same question concerning the existence of any evidence in the case as to the actual or constructive notice on the part of appellants, or either of them, of the existence of the wire on the walk. Thus, while each specification is urged herein, the following analysis of law and the evidence is directed to the single question in issue. At the conclusion thereof the particular application to the respective specifications is made.

Statement of Points of Law and Fact Discussed

1. **In Order to Impose Liability for Injury to an Invitee Upon Real Property, by Reason of Failure to Maintain the Premises in a Reasonably Safe Condition, the Owner or Occupant Must Have Actual or Constructive Notice of the Dangerous Condition.**

Anderson v. Reeder, 42 Wn. (2d) 45, 253 P. (2d) 423;

Chambers v. Slattery, 147 Wash. 538, 266 Pac. 185;

Leek v. Tacoma Baseball Club, 38 Wn. (2d) 362, 229 P. (2d) 329;

Dodak v. Lewis, 187 Wash. 138, 59 P. (2d) 1121;

Mathis v. H. S. Kress Co., 38 Wn. (2d) 845, 232 P. (2d) 921;

Montgomery Ward & Co. v. Lamberson (CAA 9th Cir., 1944), 144 F. (2d) 97; 32 Am. Jur., pp. 559-564, 571-572, Landlord and Tenant, §§ 687, 688, 694.

2. **There Was No Evidence That Appellants, or Either of Them, Had Notice, Either Actual or Constructive of the Wire on the Walk.**

Transcript of record pp. 37-306.

In the absence of contention of counsel for appellees to the contrary it is suggested that the Court may eliminate, in consideration of this point, the testimony of the following witnesses:

Dr. Paul Ruuska, R. 69-84

Dr. William R. Duncan, R. 166-177

George R. Cooley, electrical engineer, R. 184-203.

3. **Each of Appellants' Specifications of Error Is Established by Appellants' Legal Authorities, Point 1 Above, and by the Absence of Evidence of Notice, Point 2 Above.**

ARGUMENT

1. **In Order to Impose Liability for Injury to an Invitee Upon Real Property, by Reason of Failure to Maintain the Premises in a Reasonably Safe Condition, the Owner or Occupant Must Have Actual or Constructive Notice of the Dangerous Condition.**

The status of the appellee at the time and place of the accident was that of an invitee on premises of which the appellants were the owners and occupants. This is established because appellees were

tenants of the appellants (R. 96, 115) and because the place where appellee fell was one of the common walkways on the apartment house project (R. 37, 95, 123; plaintiffs' Ex. 5, R. 89).

Anderson v. Reeder, 42 Wn. (2d) 45, at 48, 253 P. (2d) 423 at 425:

"Where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof for the common use of such tenants, it is his duty to exercise reasonable care to keep safe such parts which he reserves for common use, and over which he has control. Tenants who use such portions reserved for common use are invitees of the landlord. In order to render him liable to a tenant injured while using such portions, however, it must appear that there was reasonable cause to apprehend such injury. 32 Am. Jur. 561, Landlord and Tenant, § 688."

32 Am. Jur., Landlord and Tenant, § 687, p. 559:

"The liability of a landlord for personal injuries to a tenant or a person in the right of a tenant, where received while using a portion of the landlord's premises not expressly included in the tenant's lease, and of which the landlord retains possession and control, assuming that the injury was due to defects in the premises attributable to the negligent failure of the landlord to keep the same in a reasonably safe condition, depends, in part at least, upon the character of the tenant's use. A tenant in his use of certain parts of the landlord's premises may be an invitee, a trespasser, or a mere licensee."

Appellants are not insurers of the safety of appellee. *Chambers v. Slattery*, 147 Wash. 538, at 539, 266 Pac. 185, at 186:

“All other claims of error seem to center around the proposition that respondent was guilty of negligence as a matter of law, and that the court should have so decided. The argument seems to be that the owner of an apartment house having an automatic elevator is an insurer of the safety of tenants operating the same, and is guilty of negligence, if he fails to prevent the possibility of an accident to one riding therein. Such is not the law.”

Rather appellants owed to appellee the duty of using reasonable care in maintaining the walk in a reasonably safe condition. 32 Am. Jur., Landlord and Tenant, § 688, pp. 561-563:

“It is generally held that where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof, such as entrances, halls, stairways, porches, walks, etc., for the common use of different tenants, it is his duty to exercise reasonable care to keep safe such parts of which he so reserves control, and if he is negligent in this regard, and a personal injury results by reason thereof to a tenant or to a person there in the right of the tenant, he is liable, provided the injury occurs while such part of the premises is being used in the manner intended.”

Anderson v. Reeder, 42 Wn. (2d) 45, 253 P. (2d) 423.

The duty of appellants, owners of the premises, as landlord, is no different than the duty owed by any owner or occupant of real property to any invitee upon his premises. Consequently all cases against owners or occupants of real property involving injuries to invitees thereon resulting from

a condition of the premises are pertinent to the instant case. One such case, for example, is the case of *Leek v. Tacoma Baseball Club*, 38 Wn. (2d) 362, 229 P. (2d) 329, in which the same rule of reasonable care was applied in a suit between a patron and spectator at a baseball game and the owner of the baseball park. It was held that the spectator was an invitee on the premises. At p. 364 of the official reports (29 P. (2d) 230) the court states:

“It is uniformly held that the operator of a baseball park, although not an insurer of the safety of its patrons, is bound to exercise reasonable care, or that care commensurate to the circumstances, to protect its patrons against injury.”

At page 365 of the official reports (229 P. (2d) 231) the court sets forth the fundamental principle that the owner or occupant of real property is liable for injuries to an invitee only if he knew, or in the exercise of reasonable care should have known, of the existence of the condition causing the injury:

“Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor’s knowledge, actual or imputed, of the danger to another in the act to be performed. *Burr v. Clark*, 30 Wn. (2d) 149, 190 P. (2d) 769; 38 Am. Jur. 678, Negligence, § 32; 65 C.J.S. 351, Negligence, § 5.

“This principle is an integral part of the law relating to the liability of owners or occupants of premises. Generally speaking, the possessor of land is liable for injuries to a business visit-

or caused by a condition encountered on the premises only if he (a) knows or should have known of such condition and that it involved an unreasonable risk; (b) has no reason to believe that the visitor will discover the condition or realize the risk; and (c) fails to make the condition reasonably safe or to warn the visitor so that the latter may avoid the harm. *Hudson v. Kansas City Baseball Club*, 349 Mo. 1215, 164 S.W. (2d) 318, 142 A.L.R. 858; 2 Restatement of Torts 938; 38 Am. Jur. 754, Negligence, § 96; 65 C.J.S. 521, Negligence, § 45.

As in the foregoing case, it is essential in order to impose liability upon the owner or occupant of real property that he must have notice, actual or constructive, of the existence of the defect causing the injury. This is true in the case of the owner or occupant standing in the position of landlord.

32 Am. Jur., Landlord and Tenant, § 694, p. 571

“Actual or constructive knowledge on the part of the landlord of the defect causing the injury is necessary to render the landlord liable. It is generally held that to recover for injury received from the defective condition, the burden is on the tenant injured to show that the landlord knew of the defect or by the exercise of reasonable care would have known of it. The negligence of a landlord in regard to the safety of the approaches to the leased premises, and the halls and stairways therein, used by different tenants, is based upon his failure to use ordinary care to keep such portions of the premises in a reasonably safe condition after having notice or knowledge, actual or constructive, of defects therein. It must be shown either that the landlord had knowledge of the defect or that it had been in an unsafe condition for such a length of time that the landlord should

have known of it. The question as to the length of time a defect must exist in order that the owner may be charged with notice or knowledge thereof depends very largely upon the nature of the defect and the facts of the particular case."

Dodak v. Lewis, 187 Wash. 138, 59 P. (2d) 1121.

This is true also in the case of the owner or occupant of real property standing in the position of shopkeeper: *Mathis v. H. S. Kress Co.*, 38 Wn. (2d) 845, 232 P. (2d) 921. In that case a judgment n.o.v. in favor of the defendant was sustained on appeal. The plaintiff was injured while in the defendant's store, and brought suit to recover therefor, alleging that the defendant had negligently allowed certain liquid to accumulate on the floor, causing plaintiff to slip and fall. At the trial no evidence was introduced by the plaintiff to show how the liquid came to be on the floor or how long it had been there. The defendant denied that there was any liquid on the floor at the time of the accident. At pp. 846-847 of the official reports (232 P. (2d) 922) the court stated as follows:

"This appeal, since it is not contended that the respondent had actual notice of the liquid on the floor, presents the single question: Was there any evidence from which it could be inferred that the respondent was put upon constructive notice that the dangerous condition existed?

"On a motion for judgment n.o.v., the court is bound to consider the evidence, and the inferences to be drawn therefrom, from the

standpoint most favorable to the appellant. *Witte v. Whitney*, 37 Wn. (2d) 865, 226 P. (2d) 900; *Baker v. Mutual Life Ins. Co. of New York*, 32 Wn. (2d) 340, 201 P. (2d) 893.

"It is the well-established rule that, where the negligence of a storekeeper is predicated upon his failure to keep his premises in a reasonably safe condition, it must be shown that the condition has either been brought to his attention, or has existed for such time as would have afforded him sufficient opportunity, in the exercise of reasonable care, to have become cognizant of and to have removed the danger. *Smith v. Manning's, Inc.*, 13 Wn. (2d) 573, 126 P. (2d) 44; *Wiard v. Market Operating Corp.*, 178 Wash. 265, 34 P. (2d) 875. It is incumbent upon the appellant to produce evidence tending to prove that the respondent had constructive notice of the dangerous condition. See *Kennett v. Federici*, 200 Wash. 156, 93 P. (2d) 333. Liability cannot be predicated upon conjecture.

"Assuming, as we must, that the liquid was on the floor, and that an employee of the respondent was a few feet away, this alone does not prove negligence, since there is an absence of proof as to how long it was there. *Kroger Grocery & Baking Co. v. Spillman*, 279 Ky. 366, 130 S.W. (2d) 786. The floor girl, Mary Fasevich, testified there was no liquid on the floor, so we are not presented with the question of whether or not notice to her was notice to her employer, the respondent. The liquid could have fallen on the floor immediately preceding the accident, and at least some appreciable time must have been shown to have elapsed before constructive notice can be inferred. Appellant produced no such evidence to take the case to the jury."

Montgomery Ward & Co. v. Lamberson (OCA, 9th Cir., 1944), 144 F. (2d) 97, is a similar case. In

that suit the appellee was injured while an invitee in appellant's store when she fell on a ramp near one of the exits. The case was tried to the Judge of the District Court and upon conclusion of the trial findings of fact and conclusions of law were entered and judgment was entered in appellee's favor. At page 98 of the opinion this court stated as follows:

"Appellees alleged and appellant admitted that Lydia Lamberson entered the store for the purpose of purchasing merchandise from appellant. Therefore she was an invitee, and appellant owed her the duty of maintaining its premises in a reasonably safe condition and of exercising reasonable care to protect her from injury. If appellant violated that duty, it was negligent; otherwise not.

"Appellees alleged, in substance, that while Lydia Lamberson was in the store, appellant, by its agents, servants and employees, threw water on the ramp; that the ramp was thereby made wet and slippery and was in that condition when Lydia Lamberson left the store; that by reason thereof, Lydia Lamberson slipped, fell and was injured; that appellant was negligent in throwing water on the ramp, failing to mop the water from the ramp, failing to put ashes or sand on the ramp, allowing the ramp to be in a wet and slippery condition, and failing to warn Lydia Lamberson thereof; and that appellant's negligence was the proximate cause of Lydia Lamberson's injuries. Appellant denied all these allegations.

"The court did not find, nor was there any evidence from which it could have found, that appellant or any agent, servant or employee of appellant threw water on the ramp, or put or

standpoint most favorable to the appellant. *Witte v. Whitney*, 37 Wn. (2d) 865, 226 P. (2d) 900; *Baker v. Mutual Life Ins. Co. of New York*, 32 Wn. (2d) 340, 201 P. (2d) 893.

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"Appellees alleged, in substance, that while Lydia Lamberson was in the store, appellant, by its agents, servants and employees, threw water on the ramp; that the ramp was thereby made wet and slippery and was in that condition when Lydia Lamberson left the store; that by reason thereof, Lydia Lamberson slipped, fell and was injured; that appellant was negligent in throwing water on the ramp, failing to mop the water from the ramp, failing to put ashes or sand on the ramp, allowing the ramp to be in a wet and slippery condition, and failing to warn Lydia Lamberson thereof; and that appellant's negligence was the proximate cause of Lydia Lamberson's injuries. Appellant denied all these allegations.

"The court did not find, nor was there any evidence from which it could have found, that appellant or any agent, servant or employee of appellant threw water on the ramp, or put or

placed any water on the ramp, or caused any water to be on the ramp. The court did find that the ramp had water on it when Lydia Lamberson left the store, and that by reason thereof, Lydia Lamberson slipped, fell and was injured. These findings are supported by evidence and hence are accepted by us as correct.

"How the water got on the ramp does not appear. The accident occurred on a bright, sunny day. There was no rain or snow. Lydia Lamberson entered the store about 3 p. m. and left about 3:30 p. m. The ramp was dry—had no water on it—when she entered the store. No one, so far as the evidence shows, saw any water on the ramp prior to the accident. The water had not been on the ramp more than 30 minutes when the accident occurred. It may have been there only a few seconds.

"The court did not find, nor was there any evidence from which it could have found, that the fact that the ramp had water on it was known or should have been known to appellant prior to the accident. The court nevertheless concluded that appellant was negligent in permitting the ramp to have water on it, failing to put ashes, sand, salt or matting on the ramp, and failing to notify Lydia Lamberson of the fact that the ramp had water on it—a fact of which appellant itself, so far as the evidence shows, had no notice, actual or constructive.

"The conclusion was unwarranted, for the rule is that, 'In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises, the condition must have been known to the owner or occupant or have existed for such time that it was the duty of the owner or occupant to know of it.' In other words, the owner or occupant must have had actual or constructive notice of the dangerous condition. The rule is applicable and has often been applied to cases like the present one

—cases in which it was sought to hold a storekeeper liable for injuries sustained by an invitee in slipping and falling on the storekeeper's premises. Some of these cases are cited in the margin. Many others could be cited.

"In every such case, the plaintiff has the burden of proving that the defendant had actual or constructive notice of the dangerous condition which is claimed to have been the cause of the accident. So here, appellees had the burden of proving that appellant had actual or constructive notice of the fact that the ramp had water on it. The burden was not sustained. It would have been sustained if appellees had proved that appellant, by its agents, servants and employees, put the water on the ramp; for if appellant did that, it necessarily had notice of the fact. But there was no such proof.

"Mere proof of the fact that an accident occurred did not shift the burden of proof to appellant, nor did that fact create a presumption that appellant was negligent. Instead, the presumption was, and is, that appellant exercised reasonable care. The doctrine of *res ipsa loquitur* has no application to the facts of this case.

"The duty owing by appellant to Lydia Lamberson was not that of an insurer, but was merely that of maintaining its premises in a reasonably safe condition and of exercising reasonable care to protect her from injury. There was no evidence that appellant violated that duty."

It will be observed from these cases that in order to establish constructive notice to the owner or occupant of the real property, that is, that the owner or occupant should have known, in the exercise of reasonable care, of the existence of the condition, the plaintiff must show when the condition or ob-

placed any water on the ramp, or caused any water to be on the ramp. The court did find that the ramp had water on it when Lydia Lamberson left the store, and that by reason thereof, Lydia Lamberson slipped, fell and was injured. These findings are supported by evidence and hence are accepted by us as correct.

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“In every such case, the plaintiff has the burden of proving that the defendant had actual or constructive notice of the dangerous condition which is claimed to have been the cause of the accident. So here, appellees had the burden of proving that appellant had actual or constructive notice of the fact that the ramp had water on it. The burden was not sustained. It would have been sustained if appellees had proved that appellant, by its agents, servants and employees, put the water on the ramp; for if appellant did that, it necessarily had notice of the fact. But there was no such proof.

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“The duty owing by appellant to Lydia Lamberson was not that of an insurer, but was merely that of maintaining its premises in a reasonably safe condition and of exercising reasonable care to protect her from injury. There was no evidence that appellant violated that duty.”

It will be observed from these cases that in order to establish constructive notice to the owner or occupant of the real property, that is, that the owner or occupant should have known, in the exercise of reasonable care, of the existence of the condition, the plaintiff must show when the condition or ob-

struction occurred, or at least that it had existed for a sufficient period under the circumstances to charge the defendant, in the exercise of reasonable care, with notice thereof. In the absence of such a showing the plaintiff must show that the defendant had actual notice of the existence of the condition prior to the accident.

The identical principles are illustrated by the sidewalk cases against municipalities, the duty of the municipality being comparable to that of the owner or occupant of real property.

Chase v. Seattle, 80 Wash. 61, at 64, 141 Pac. 180 at 181; *Zellers v. Bellingham*, 83 Wash. 601, 145 Pac. 613; *Johnson v. Ilwaco*, 38 Wn. (2d) 408, 229 P. (2d) 878.

The case of *Russell v. Grandview*, 39 Wn. (2d) 551, 236 P. (2d) 1061, illustrates the distinction between a defective condition actually created by a city and those in which the defects occurred for some other reason than the active negligence upon the part of the city. In the latter type of case the duty to correct the condition, as in the instant case, cannot arise until the city has actual or constructive notice of the defect. At p. 554 of the official reports (236 P. (2d) 1063) the court states:

“The city seeks to draw an analogy between the facts of this case and those involved in cases where injuries were sustained arising out

of defects in streets or sidewalks, or obstructions in the way of the normal use thereof, or breaks in pipes carrying gas. Liability in such cases, and those of like import, arises out of negligence in failure to keep the instrumentalities in a proper state of repair. If the defects do not occur by reason of active negligence upon the part of the city, the duty to repair cannot arise until the city has actual or constructive notice of the defects. The city becomes negligent when, after such notice, it fails to make the necessary repairs. If, however, the dangerous condition is caused by agents of the city in the performance of their duties, the rule of liability is not based on notice and failure to repair, but upon the creation of a dangerous condition by the city. *Nevala v. Ironwood*, 232 Mich. 316, 205 N.W. 93, 50 A.L.R. 1189, and annotation appended."

2. There Was No Evidence That Appellants, or Either of Them, Had Notice, Either Actual or Constructive, of the Wire on the Walk, Prior to the Accident.

The only finding made by the District Court of negligence on the part of the appellants, or either of them, was in failing to maintain the wire barricade adjacent to the sidewalk where appellee fell in a reasonably safe condition and in permitting the wire to remain on the walk, and in failing to remove the same (which is the same thing) after the appellants knew, or should have known, of the presence of the wire on the walk (R. 11-15).

The only reason necessitating any particular maintenance of the wire fences, was that heedless

tenants, children of tenants, and paperboys, from time to time broke down or cut the fences in various parts of the project (R. 100, 116, 242, 262). Such is the only evidence or inference to be derived from the evidence as to how the particular wire over which the appellee fell came to be upon the sidewalk.

Appellants' Maintenance Program

The appellants had a definite program for the maintenance of these wire fences (R. 212-216, 224-226, 252-256, 261-262, 271-276). This program consisted of the assignment of one man, Clarence Dykeman, to the duty of inspecting and repairing all of such fences on the project site each day. Commencing each morning, this man stayed with the job until every fence requiring it was repaired (R. 288). He worked on the day of the accident and regularly during the preceding week (defendants' Ex. A-13, A-14; R. 180-182, 281-282, 284-286). Consequently, all fences on the project were inspected and all those which had been broken down were repaired or replaced once each day between the hours of 8:00 A.M. and 4:30 P.M. (R. 281-288). In addition, the appellants coordinated the work of numerous other outside maintenance personnel (defendants' Ex. A-13, R. 181) so as to afford additional regular daily inspection and repair, if necessary, of these fences.

A clean-up man passed over the entire project area once each day, picking up any papers and debris on the lawn areas. In making his rounds this man also reported any fences which might be in need of repair, or made temporary repairs and reported the condition to the project office, from which a man was dispatched to complete the work (R. 252-256, 273). Two men were regularly assigned to garbage pickup from the various apartment buildings. This pickup was made daily and in the course thereof these men inspected and repaired these fences or reported the condition to the project office for the dispatch of a man to do the repair work. Further, a street sweeping and cleanup detail of men swept the streets in the project daily and were otherwise instructed to, and did, report or repair any fences in need thereof. Further, the night watchman who made nightly rounds of the project area, repaired fences found to be out of order. In addition to these five, regular daily sources of maintenance of these fences, other personnel on the project maintenance force were instructed to repair or report to the office of the project all fences found by any of them to be in need of repair. While the nature of the duties of such other personnel did not take them regularly and daily over the entire project site, nevertheless, in the course of their daily duties they had occasion to pass to and fro about the various parts

of the project. Finally, the appellants received and serviced, through a regular office procedure, at the project office, any complaints or reports received from tenants or employees, of fences out of order. These calls were serviced daily and were not allowed to carry over in any instance to the following day (R. 273-276, 289).

At the conclusion of the trial the District Court announced its oral decision in favor of appellees and stated therein, in part, as follows (R. 308):

“That the Court does not believe that there is a convincing showing or a showing by a preponderance of the evidence or any showing at all on the part of the defendants or anyone else in this case that a particular individual did actually make or that any individual acting for or on behalf of the defendants made an inspection of the premises near the place of the accident between the time the defendants’ employee Dykeman ended his day’s work and the time of the occurrence of this accident.”

It is respectfully submitted that to impose upon the appellants the requirement of the standard thus set by the court to every hour of the day, is to make of the appellants insurers of the safety of their tenants, contrary to the authorities hereinabove cited pp. 15-25). The employee Dykeman, referred to, terminated his work at 4:30 P.M. The accident occurred at approximately 5:45 P.M. (R. 139). The appellants’ night watchman, Cvetikovs, commenced work at 6:00 P.M. (R. 205).

It is further respectfully submitted that it is indicated by the above statement from the court's oral decision that the court overlooked the requirement of the law that the appellants must have notice of the wire on the walk, actual or constructive, before the accident; for failure to make an inspection within the span of time specified by the court could not have been negligence as to appellants nor a proximate cause of the accident unless it were also shown that the wire was on the walk during that interim. As this court stated in the *Lamberson* case, 144 F. (2d) 97, supra, p. 20, it may have been there just a few moments, so far as appears from the evidence.

Appellants Had No Actual Notice

The appellees had the burden of showing that the appellants either knew, or in the exercise of reasonable care should have known, of the presence of the wire on the sidewalk. Not one witness in the case testified that the appellants, or either of them, actually knew that the wire was on the walk prior to the accident. It is believed that appellees will not contend to the contrary. There is no statement or exhibit in the record that prior to the accident any one informed appellants, or either of them, or any agent or employee, that the wire was obstructing the walk. There is no testimony or exhibit indicat-

ing that any employee or agent of the appellants, or either of them, placed or dropped said wire on the walk or otherwise caused the same to be there or allowed the same to remain there after seeing it. To the contrary, all of the evidence is that tenants, principally children of the tenants, wilfully or carelessly broke down the wire fences from time to time (R. 100, 116, 242, 262).

The court made no oral finding as part of its oral decision that appellants had actual knowledge of the presence of the wire (R. 307-311).

Appellants Not Chargeable with Constructive Notice

Nor was there any evidence in the case that the appellants could have in the exercise of reasonable care known of the existence of the wire on said walk. There was no evidence whatsoever as to how long the wire had been there prior to the accident. Under the legal authorities above cited this is essential to a finding that the appellants should have known of its presence.

In this respect we have considered the testimony of Yvonne Hart (R. 88-95, at R. 90). Hers is the only testimony in the entire case that could be related to the wire over which the appellee fell and which in any respect indicates that the fence was in disrepair at any time prior to the accident. Her testi-

mony was that one week before November 5, 1952, while going to appellee's apartment to visit her, she observed a wire from a fence along the walk in question lying in the middle of the sidewalk. She testified, however, that in leaving the Dooley residence she did not see the wire though she left by the same route as she arrived (R. 92) and though she had her little boy with her, whom she stated she had taken the precaution to warn about the wire on their way in. Experience would indicate that a mother would have observed the same condition on the way out had it not been corrected in the interim. Further, the appellee Jean Dooley testified (R. 134-138) that in the week prior to her accident she had passed the place where she fell, daily, going and coming, and perhaps several times a day, without noticing the particular wire was down, as testified by Mrs. Hart. Appellee testified she had passed that spot many times during the week before the accident (R. 138).

Further, the witness Clarence Dykeman testified (R. 280-288) that he had repaired all of the fences on the project site in need of repair each day commencing at the time he started to work at 8:00 A.M. and continuing until the job had been completely performed and all of these fences were in proper repair. His time record is in evidence (defendants' Ex. A-13, R. 182) confirming the fact that he had

worked his regular shift during the week preceding the accident. It is further indicated by the court's oral decision (R. 307) that the court concluded from the evidence that the wire was not in the condition as testified by Mrs. Hart from the time she had seen it. Had the court concluded otherwise it would not have specified that the negligence of the appellants consisted of failure to have an inspection made of the area of the premises near the place of the accident between 4:30 P.M. on the day of the accident and 5:45 P.M., the time it occurred. Consequently there is no evidence in the case to show that the appellants should have known of the existence of the wire on the walk, prior to the accident.

3. Each of Appellants' Specifications of Error Is Established.

The foregoing analysis of the law and the evidence establishes, we submit, that the District Court erred in each of the respects specified in the specifications of error above (pp. 9-12). As indicated in the summary of argument herein, each of the acts or determinations by the District Court so specified is in error because there was no evidence in the case that the appellants, or either of them, knew or should have known that the wire was on the walk prior to the accident. The argument herein of the law and the evidence is, accordingly,

addressed to each of the specifications of error, and, we urge, establishes each of the specifications of error. In particular it is urged and contended with respect to each of the specifications as follows:

Specification 1. That at the conclusion of the appellees' case there was no evidence of either actual or constructive notice to the appellants, or either of them, to warrant a finding that the appellants had either actual or constructive notice of the presence of the wire on the walk, and therefore appellees failed to produce sufficient evidence to sustain a cause of action against the appellants, or either of them. The appellants' motion to dismiss should have been granted. (Argument pp. 14-32.)

Specification 2. The absence of any evidence that the appellants, or either of them, had notice, actual or constructive, of the existence of said wire on said sidewalk prior to the accident renders unwarranted and clearly erroneous a finding by the court in paragraph VI of its findings (R. 13-14) that said wire was permitted by the appellants to obstruct the sidewalk and a finding that appellee tripped over said wire as the result of the negligence of appellants in maintaining the wire barricade. (Argument pp. 14-32.)

Specification 3. The absence of any evidence that the appellants, or either of them, had notice, actual or constructive, of the existence of said wire on said

sidewalk prior to the accident renders unwarranted and clearly erroneous a finding by the court that appellants, or either of them, were negligent in failing to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk and in failing to remove the wire therefrom. Accordingly, the District Court erred in making paragraph VIII of its findings of fact in the respect set forth in specification of errors No. 3. The legal authorities hereinabove discussed clearly establish the necessity for notice, either actual or constructive, in order to find a breach of duty on the part of appellants to the appellee. The absence of such evidence precludes the finding by the court of the existence of such actual or constructive knowledge, and in the absence of such a finding, the further finding by the court in said paragraph that said negligence on the part of appellants was a direct, proximate and concurring cause of appellee's injury and damage is unwarranted and clearly erroneous. (Argument pp. 14-32.)

Specification 4. The absence of any evidence that the appellants, or either of them, had notice of the existence of said wire on said sidewalk prior to the accident renders unwarranted and clearly erroneous the court's finding in paragraph IX that appellee's injuries and damages resulted proximately and directly from the negligence of the appellants under

the legal authorities and analysis of the evidence hereinabove set forth. (Argument pp. 14-32.)

Specification 5. The conclusions of law made and entered by the court under the cases set forth above would be sustainable only upon the basis of evidence to show actual or constructive knowledge on the part of appellants, or either of them, of the presence of the wire on the walk. There being no such evidence in the case, no finding of fact to such effect was warranted and paragraph I of the Conclusions of Law was accordingly erroneous. (Argument pp. 14-32.)

Specification 6. The United States District Court should have vacated its judgment and should have granted appellants' motion for new trial by reason of the error of law committed by the court in entering such judgment in the absence of any evidence to show that the appellants, or either of them, knew or should have known of the presence of said wire on the walk and the court erred in denying appellants' said motion. (Argument pp. 14-32.)

Specification 7. The United States District Court should have amended its findings of fact in accordance with appellants' motion therefor (R. 17-19). The findings therein proposed in amendment to paragraphs VI, VIII and IX of the court's findings contained no finding that the appellants, or either

of them knew, or in the exercise of reasonable care should have known, of the existence of said wire on said walk. Further, the proposed amendment to paragraph VIII of the court's findings as set forth in appellants' said motion was that the presence of the wire on said walk was not brought to the attention of the appellants, or either of them, nor was it shown how long said wire was there. Thus, in accordance with the authorities hereinabove cited and the evidence in the case (argument pp. 14-32), appellants' said proposed findings were in accordance with the evidence. Further, appellants' proposed amendment to paragraph VIII of the court's findings, as set forth in appellants' said motion, is the only form of finding on said issue which would be warranted and not clearly erroneous under the evidence. The court should have granted appellants' said motion for amendment of Findings of Fact for the further reason that paragraphs VI, VIII and IX of the court's findings were clearly erroneous and unwarranted in the respects set forth in specifications of error Nos. 2, 3, and 4, which errors were corrected by the appellants' proposed amendment. Upon so amending its findings in accordance with appellants' proposed amendment, the court should further have granted appellants' motion to amend the conclusions of law and judgment to comply with said findings as amended. (Argument pp. 14-32.)

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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of them knew, or in the exercise of reasonable care should have known, of the existence of said wire on said walk. Further, the proposed amendment to paragraph VIII of the court's findings as set forth in appellants' said motion was that the presence of the wire on said walk was not brought to the attention of the appellants, or either of them, nor was it shown how long said wire was there. Thus, in accordance with the authorities hereinabove cited and the evidence in the case (argument pp. 14-32), appellants' said proposed findings were in accordance with the evidence. Further, appellants' proposed amendment to paragraph VIII of the court's findings, as set forth in appellants' said motion, is the only form of finding on said issue which would be warranted and not clearly erroneous under the evidence. The court should have granted appellants' said motion for amendment of Findings of Fact for the further reason that paragraphs VI, VIII and IX of the court's findings were clearly erroneous and unwarranted in the respects set forth in specifications of error Nos. 2, 3, and 4, which errors were corrected by the appellants' proposed amendment. Upon so amending its findings in accordance with appellants' proposed amendment, the court should further have granted appellants' motion to amend the conclusions of law and judgment to comply with said findings as amended. (Argument pp. 14-32.)

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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CONCLUSION

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No. 14390

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UNITED STATES OF AMERICA; and CARROLL, HEDLUND &
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RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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NORTHERN DIVISION

APPELLEES' BRIEF

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UNITED STATES OF AMERICA; and CARROLL,
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vs.

RICHARD E. DOOLEY, and JEAN DOOLEY,
his wife, *Appellees.*

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APPELLEES' BRIEF

I. STATEMENT OF THE CASE

The appellees agree that the statement of the case as set forth by the appellants is a correct statement of the facts of the case as far as appellants have stated it. But, in addition thereto, the facts show appellants had notice, through their resident manager, that the wire fences were a menace on the project (R. 254). Appellants knew through their maintenance superintendent that fences on the project were destroyed during the day and required daily fence repairs and that it was a dangerous condition that would develop from the disrepair of the fences. It would be dangerous to an individual traveling there (R. 277, 278). The same witness had occasion frequently to repair the fence wire on casual walks through the area, sometimes once a

week and sometimes several times a week, in different areas of the project (R. 278); said fences would be down anytime between 8:00 A.M. and 4:30 P.M.; and said fences would curl across the sidewalks (R. 278). Other employees had similar notice of the fences being down in different parts of the project and such disrepair was so continuous that a constant daily repair program was in effect (R. 212, 230, 241, 261, 262).

On the basis of all the testimony pertaining to the facts adduced at the trial, the court made findings of fact shown in Paragraphs VI and VIII thereof (R. 13, 14) which are amply supported by the evidence and which findings warrant a recovery on the part of the appellees herein.

II. SUMMARY OF ARGUMENT

The appellants had constructive notice of the dangerous condition of the premises brought about by the defective wire barricade erected by appellants.

III. ARGUMENT

We agree with the appellants that in order to impose liability for injury to an invitee upon real property by reason of failure to maintain the premises in a reasonably safe condition, the owner or occupant must have actual or constructive notice of the dangerous condition.

By way of argument concerning the constructive knowledge which the appellants had of the defective condition of the wire barricade and the premises generally which were under their control, attention must be called to the testimony upon which the court made

its findings of fact. To do this it is mandatory to call the court's attention to the testimony of the various witnesses as set forth in the transcript of the record.

The mother of appellee Jean Dooley on several occasions saw the wire down and dangling in the corner of the walk in September and October, 1952, at the point where appellee fell, prior to the day her daughter fell on November 5, 1952 (R. 62, 63).

Yvonne Hart, one week prior to Mrs. Dooley's injury, visited the Dooleys, and she testified that the stakes and wires were laying across the sidewalk at the point where appellee fell (R. 90, 91).

Mrs. Dooley's husband testified the wire wasn't in very good condition prior to November 5, 1952, at the point his wife fell, and that at various times the wire was laying on the sidewalk or a stake was pulled up or knocked over (R. 99). Likewise, he testified to having seen the workers for the appellants straightening wires or putting back stakes (R. 100). He further testified that he did not think the light was adequate to cover the sidewalk where the accident occurred (R. 105). He testified that floodlights could light the sidewalk but would not light the wire (R. 108).

Jean Dooley testified to walking down the middle of the sidewalk at night and at the corner where she fell there was a wire in her path (R. 145). She testified she did not see the wire, and did see a loose wire after she had fallen in the middle of the sidewalk (R. 149).

Nickolas Cvetikovs, night watchman and utility maintenance man, testified that he worked on November 5, 1952, and worked from 6:00 P.M. every night (R.

205); that his duties with respect to the fences which were constructed around the lawn areas were whenever he was around if he saw a fence which was not in order he put the wire aside or fixed it as well as he could; he would just put it in order to "prevent disaster" (R. 208). He testified that whenever he made his round and he found the barricades down he either put them away "on" the sidewalk or just repaired as far as he could with his pair of pliers (R. 212). He testified that on occasions during the fall of 1952 and prior to November 5, 1952, he sometimes set aside barricades that had fallen down or were loose (R. 212). The same witness testified to having picked up wires that had fallen across the sidewalk in the general area where Mrs. Dooley fell a couple of times, maybe more (R. 215).

George Yamada, the maintenance gardener at Lake Burien Heights, employed by Carroll, Hedlund & Associates, Inc., testified that children would at times go out and cut the fences, cut the wires, or swing on the fences and loosen them (R. 234), and he saw barricades down in travelling about the grounds and that it was once or twice a week that he observed that, and that he himself went out and made repairs to the fences (R. 230). He further testified that everyone had a standing order to remove barricades that had fallen onto the sidewalks (R. 233), and that it was customary to place cloth markers hanging from the wire to make the wires more visible (R. 235, 236), and that in attaching cloth ribbons to the barricade wire it made the wires more safe (R. 237).

Oscar F. Hansen, of the landscape gardening firm,

testified that the lawn areas were planted in April, May and June and part of July of 1952 (R. 239) and that his firm put up the barricades around the newly-planted area (R. 240) and that he detailed one or two men to fix the fences and that he usually made the rounds in the afternoon to see if everything was okay for the night (R. 241). He testified that they did use a coarse twine to mark the wires, but the children tore them down and they finally gave up marking them (R. 243). He testified that wires were not down everyday but most of the time (R. 243).

James Brydon, the resident manager of the project, testified that he delegated one man every morning to make the rounds of the project, fixing fences and that the outside working crew worked from 8:00 A.M. to 12:00 noon and from 12:30 P.M. to 4:30 P.M. (R. 253). He testified further that all outside crews had been given orders that anything out of the ordinary seen outside of their immediate work that was wrong was to be reported to the office or to the superintendent; that would mean fences or anything of that kind that was a "menace" to the project (R. 254). He testified to having had quite a few reports of fences being down (R. 261). He testified that complaints had come in at night concerning wires and that it was the sole duty of a man to inspect the wires beginning at 8:00 A.M. in the morning until he could get the job done and that sometimes it took the man an hour or two hours or all day, and that it would take all day sometimes because a lot of wires were down (R. 262).

The maintenance superintendent, Clarence Suder, testified that daily fence repairs were necessitated be-

cause children and adults both destroyed the fences to some extent during the day or during the twenty-four hours of the day (R. 277). He further testified that he had occasion frequently to make repairs to the fence wire, sometimes once a week, sometimes several times a week and that said occasions would be precipitated upon a casual walk through the area which he himself would make, and that would occur anytime between 8:00 A.M. and 4:30 P.M.; and that at anytime he would be walking through the project he was apt to run into a broken down wire fence and that sometimes the wire would be curled across the sidewalk; that they seldom were ever straightened (R. 278). He testified that he frequently made an inspection tour throughout the area after the children went into their apartments or retired and towards evening, and that occasionally he found defects at that hour of the day (R. 279).

Clayton Dykeman, an employee of Lake Burien Heights Housing Project, testified that he was assigned to inspect the entire fencing every day and he started at 8:00 A.M. when he started work; that some days it would take maybe an hour and other days it was somewhere near the whole day (R. 281). He recalled having mended the wire at the point where appellee fell (R. 285), and that he repaired it everyday when it was down when he went around that area (R. 286). He testified that he had originally tied twine to the wire to act as a warning when he first performed his duties and that he thought it was very necessary until they got adjusted to the fence. He further testified he didn't believe the tenants had become entirely adjusted to the fences up until the time he left the project (R. 287). He testified

he left the project on November 15, 1952 (R. 281). He further testified there were times that the wires were drawn across the sidewalk (R. 287).

Marion S. Wilson, the office manager for the project, testified to occasionally receiving complaints from the tenants with respect to the wires being down and to having observed the fences down on one or two occasions (R. 293).

From the foregoing testimony it would seem quite clear that the appellants had actual knowledge that generally the wires throughout the project were down on many, many occasions and that they were a menace and a danger to the tenants and appellants would certainly be chargeable with constructive notice that the wires were apt to be down at any time, day or night, and be a danger to users of the walks.

On the basis of this testimony, is it any wonder that Judge Bowen in his decision and in the findings of fact found that the appellants were negligent in their failure to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk where appellants knew, or in the exercise of reasonable care, should have known that the tenants of said apartments walked and in the darkness would be subject to danger; that they were negligent in failing to remove the hidden danger caused by the wire being permitted to remain on the sidewalk in a place where tenants of said apartment would be in the habit of walking, after having knowledge, or in the exercise of reasonable care, should have had knowledge that said dangerous obstruction existed upon said sidewalk?

Is it any wonder that he also found that the sidewalk was under the supervision of the appellants and that the appellee, Jean Dooley, tripped over a wire which was disarranged from a wire barricade which had been erected by appellants to keep pedestrians from walking on the newly-planted lawns and which wire had become broken down in places and had curled up and was permitted by appellants to obstruct the sidewalk in a place in which appellants knew that appellee would customarily and necessarily walk; that as a result of appellants' negligence in maintaining the wire barricade, the plaintiff tripped and fell over said wire and fell violently to the ground?

The law is quite clear and counsel for appellants have cited throughout their brief the law which is generally controlling. These principles are broadly stated in 32 Am. Jur., Landlord and Tenant, Sec. 688, pp. 561-563:

“It is generally held that where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof, such as entrances, halls, stairways, porches, walks, etc., for the common use of different tenants, it is his duty to exercise reasonable care to keep safe such parts of which he so reserves control, and if he is negligent in this regard, and a personal injury results by reason thereof to a tenant or to a person there in the right of the tenant, he is liable, provided the injury occurs while such part of the premises is being used in the manner intended * * *.”

and, Sec. 694, p. 571:

“Actual or constructive knowledge on the part of the landlord of the defect causing the injury is necessary to render the landlord liable. It is gener-

ally held that to recover for injury received from the defective condition, the burden is on the tenant injured to show that the landlord knew of the defect or by the exercise of reasonable care would have known of it. The negligence of a landlord in regard to the safety of the approaches to the leased premises, and the halls and stairways therein, used by different tenants, is based upon his failure to use ordinary care to keep such portions of the premises in a reasonably safe condition after having notice or knowledge, actual or constructive, of defects therein. It must be shown either that the landlord had knowledge of the defect or that it had been in an unsafe condition for such a length of time that the landlord should have known of it. The question as to the length of time a defect must exist in order that the owner may be charged with notice or knowledge thereof depends very largely upon the nature of the defect and the facts of the particular case * * *."

We submit that the landlord in the instant case, by its agents, knew of the "menace" created by the defective wiring in the barricades and knew that "disaster" might result to the users of the walk. Appellants knew for months of the dangerous condition of the premises and exercised a maintenance program which they felt was sufficient to protect themselves from liability, acknowledging, however, that the condition was not controlled during the darkness; and it also must be acknowledged that the condition was more dangerous in the darkness of night time than in the day time. Yet their program for inspection was not in effect in the night time. When they knew that every morning fences would be found down, it would appear that they should

have taken some precaution to have erected a barricade that was not so faulty and that would not cause injury to others, which they knew the wire barricade would do.

The expense of a wooden fencing would certainly be far less than the wages paid daily to an inspector to repair the fence which they used as a barricade. It would be far more inexpensive to erect a suitable barricade which would cause no one any damage or injury and would be suitable for the purposes intended, namely—to protect the lawns and not cause damage to users of the sidewalks. A barricade of 2x2's placed on 2x2 stakes surrounding the lawn areas would be almost as inexpensive to erect as the wire barricades and certainly the children would not have been able to cut those and break them down as the landlord claims they did with the wire barricades. It would just seem reasonable to require appellants to erect a suitable, safe barricade, than to have the appellants erect an unsuitable, dangerous barricade as they did—a barricade which was much more expensive to maintain than it would have cost to erect a safe barricade in the original instance.

Counsel for appellants are attempting to excuse appellants for negligence in the erection and maintenance of the faulty barricades on the basis that, at the particular time and at the particular place on the sidewalk where appellee fell, they did not have actual knowledge of the barricade being down. This contention, of course, ignores completely the constructive knowledge that they should have had, in the exercise of any reasonable care under the circumstances, that the barricade in that particular place was apt to have been down and on in-

spection would have been found down at the time in question. They also erected the barricade in the first place and knew from experience that it was so faultily built as to constitute a menace to tenants.

If they did not actually know, the point is that they should have known that this wire would be down from the experience they had in this section of the grounds and in other sections of the grounds, and we contend that their past experiences constituted constructive notice to them of the defect.

The whole argument of the appellants in this case is that because they did not have actual knowledge they cannot be held responsible for the damage created. This overlooks entirely all of the law which is to the effect that they are liable for damages if they had *constructive* knowledge of defects. We submit that in this case, by their own testimony and evidence, the appellants show that they had constructive knowledge of the defects and knew of the dangers and that the defects were apt to cause damage to users of the sidewalks.

We agree with the statements of law advanced by appellants in their argument with reference to the obligations herein of the appellants toward appellee. Basically the principles are found in the decision of *Anderson v. Reeder*, 42 Wn.(2d) 45, 48, 253 P.(2d) 423, quoted in appellants' brief:

“Where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof for the common use of such tenants, it is his duty to exercise reasonable care to keep safe such parts which he reserves for common use, and over which he has con-

trol. Tenants who use such portions reserved for common use are invitees of the landlord. In order to render him liable to a tenant injured while using such portions, however, it must appear that there was reasonable cause to apprehend such injury. 32 Am. Jur. 561, Landlord and Tenant, Sec. 688.”

and to the same effect is the rule stated in *Andrews v. McCutcheon*, 17 Wn.(2d) 340, 345-346, 135 P.(2d) 459:

“ * * * When the landlord either expressly or impliedly reserves control over the stairway, whether there be one tenant or several, the tenant or tenants will be protected in his or their right to the use of the stairway, and the landlord has the legal duty to keep and maintain the stairway in a reasonably good and safe condition for use by such tenants and their invitees.

“The foregoing rules of law are announced and discussed in the following cases: *Lindbloom v. Berkman*, 43 Wash. 356, 86 Pac. 567; *Konick v. Champneys*, 108 Wash. 35, 183 Pac. 75, 6 A.L.R. 459; *Johnson v. Smith*, 114 Wash. 311, 194 Pac. 997; *McGinnis v. Keylon*, 135 Wash. 588, 238 Pac. 631; *Leuch v. Dessert*, 137 Wash. 293, 242 Pac. 14; *Holm v. Investment & Securities Co.*, 195 Wash. 52, 79 P.(2d) 708; *Brandt v. Rakauskas*, 112 Conn. 69, 151 Atl. 315; *Starr v. Sperry*, 184 Iowa 540, 167 N.W. 531; *Roman v. King*, 289 Mo. 641, 233 S.W. 161, 25 A.L.R. 1263, note p. 1273; and note 58 A.L.R. 1412. 4 Thompson on Real Property (Perm. ed.), pp. 88, 94, Secs. 1594, 1596. Restatement of the Law of Torts, p. 980, Sec. 361. 32 Am. Jur., Landlord and Tenant, p. 165, Sec. 170, p. 564, Sec. 689, p. 567. Sec. 691.”

Likewise, in *Leuch v. Dessert*, 137 Wash. 293, 295, 242

Pac. 14, the court followed the rule announced in *Seattle v. Puget Sound Improvement Co.*, 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L.R.A.(N.S.) 949, which was a case where the owner of a building had a trapdoor over an areaway in the sidewalk used exclusively for the benefit of the building. The building itself had been leased to various tenants. There was nothing in their tenancy that gave them control of this areaway. The court held that the maintenance and actual possession of that part of the building was in the owner at all times and the court held that he was the one who was responsible for injury resulting to a pedestrian who had been injured by stumbling over the trapdoor. At page 296, the court stated:

“Situations similar to that in the instant case have been considered many times, and the rule we find to be as we have already announced it. Some of these authorities so holding are: *O'Connor v. Andrews*, 81 Tex. 28, 16 S.W. 628; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Yorra v. Lynch*, 226 Mass. 153, 115 N.E. 238; *Gilland v. Maynes*, 216 Mass. 581, 104 N.E. 555; *Trustees of Village of Canandaigua v. Foster*, 156 N.Y. 354, 50 N.E. 971, 66 Am. St. 575, 41 L.R.A. 554; *Jennings v. Van Schaick*, 108 N.Y. 530, 15 N.E. 424, 2 Am. St. 459; *Siggins v. McGill*, 72 N.J.L. 263, 62 Atl. 411, 111 Am.St. 666, 3 L.R.A.(N.S.) 316; *Branigan v. Lederer Realty Corp.*, 101 Atl.(R.I.) 122; *Perry v. Levy*, 87 N.J.L. 670, 94 Atl. 569; *Payne v. Irvin*, 144 Ill. 482, 33 N.E. 756; *Looney v. McLean*, 129 Mass. 33; *Bissell v. Lloyd*, 100 Ill. 214; *Security Sav. & Comm. Bank v. Sullivan*, 261 Fed. 461; *Wardman v. Hanlon*, 280 Fed. 988; *Frank v. Simon*, 109 App. Div. 38, 95 N.Y.Supp. 666; *Tauber*

v. Rochelsky, 90 Misc. Rep. 382, 153 N.Y.Supp. 199; *Fleischer v. Dworsky*, 90 Misc. Rep. 628, 153 N.Y.Supp. 951; *Gude & Co. v. Farley*, 28 Misc. Rep. 184, 58 N.Y.Supp. 1036; *MacNair v. Ames*, 29 R.I. 45, 68 Atl. 950; *Brown Co. v. O'Connor*, 151 S.W. (Tex. Civ. App.) 339."

In the instant case we certainly believe the appellants had reasonable cause to apprehend the injury that occurred to appellee, and had constructive knowledge, if not actual knowledge, of the defect in their barricades. We believe the appellants were negligent to the extreme in maintaining and continuing a known, dangerous defective barricade system.

In attempting to answer the brief of appellants herein, it is quite clear that the divergence of opinion in the case is brought on by the appellants complete lack of understanding of the meaning of constructive knowledge. The term, in itself, indicates it would not be actual knowledge but is a knowledge which should be learned by the party through their known experiences. Cases cited by appellant are all good law but are not applicable to the situation of the instant case. The cases dealing with invitees of department stores and other commercial establishments are all predicated on their particular facts and go off on the principle that no proof was adduced concerning the knowledge of the landlord or store owner of the defect. It is quite true that grease spots and obstructions on floors of department stores may not have come to the attention of the landlord; but in our case, for months the appellants knew of the defects and the dangers and installed a faulty system of maintenance to try and correct the

dangerous condition. Their attempt to do so, we see, was unsuccessful, as injury resulted to appellee from said defects.

IV. CONCLUSION

We respectfully submit that the decision of the District Judge, entering judgment in favor of the appellees in this cause, should be affirmed.

Respectfully submitted,

R. P. GUIMONT,
Attorney for Appellees.



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character, type or design of the fences protecting the newly seeded lawn areas. The right of the appellants to install these fences was established by authorities cited to the District Court:

Cohen v. Davies (Mass 1940), 25 N.E. (2d) 223, 129 A.L.R. 735;

Merrill, et al v. Morris Court, Inc. (Minn. 1930) 231 N.W. 231;

Mazey v. Loveland (Minn. 1916), 158 N.W. 44;
Mead v. Strauss, 202 Mass. 399, 88 N.E. 889.

The only finding of negligence made by the District Court, in essence, was in failing to remove the particular wire from the sidewalk where the appellee tripped (R. 13-15); which, under the only evidence in the case, had become broken due solely to the unwarranted acts of other persons for whose acts the appellants had no responsibility. That the appellants were compelled by the acts of irresponsible persons to adopt a daily maintenance program (Appellants' Brief pp. 26-29) in order to protect the planted and beautified areas is no different from the grocer, shopkeeper or restaurant operator who must daily, and more often, inspect and sweep his floors, walks, parking areas, etc. knowing customers carelessly knock vegetables on the floor, disarrange counters, track in mud and water, etc. Appellees are not relieved from the burden of showing that the misplaced object, be it foodstuff, liquid, or wire, had existed for a sufficient time to charge

appellants with constructive notice thereof, in the absence of a showing of actual notice of its presence.

II. REPLY TO SUMMARY OF ARGUMENT

It is to be observed that appellees place their entire reliance upon the sufficiency of the evidence to support the court's finding that the appellants had constructive notice. The absence of any actual notice is tacitly conceded.

III. REPLY TO APPELLEES' ARGUMENT

The sole question is whether or not there is any evidence to show that the wire over which the appellee fell had been out of place on the sidewalk for a period of time sufficient to charge the appellants with constructive notice of its presence and thereby with negligence in failing to remove the same. This is made abundantly clear by reference to the oral decision announced by the District Court at the conclusion of the case (R. 308) in which the court declared that its conclusion was reached because there was no:

“ * * * convincing showing or a showing by a preponderance of the evidence or any showing at all on the part of the defendants or anyone else in this case that a particular individual did actually make or that any individual acting for or on behalf of the defendants made an inspection of the premises near the place of the accident between the time the defendant's employee Dykeman ended his day's work and the time of the occurrence of this accident.”

Practically all of the testimony discussed and alluded to by appellees (Appellees' Brief 3-7) is immaterial to this issue. Nowhere in their brief do appellees point to any evidence adduced at the trial which shows the wire over which the appellee tripped to have been present on the sidewalk for any period of time. The authorities cited and discussed in appellants' brief (pp. 13 through 25) illustrate clearly the concept of constructive notice as applied to cases of this type. Appellees' argument is grounded upon the contention that the system of barricades generally, installed by the appellants throughout appellants' project site to protect the newly seeded areas, were improperly installed, designed or constructed. Emphatically, no such finding was made by the District Court. The sole issue concerns the wire on the sidewalk over which, the court found, the appellee fell. To charge appellants with constructive notice thereof, it must be shown that such condition existed for a period of time sufficient for the appellants in the exercise of reasonable care to become aware of its presence. Consistent with all of the evidence in this case the wire could have existed on the walk for an instant only prior to the time appellee fell. The evidence does not support the finding that the appellants had constructive notice of its presence.

CONCLUSION

For the reasons set forth in Appellants' Brief and herein ,it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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No. 14394

United States
Court of Appeals
for the Ninth Circuit

WILLIAM RADOVICH,

Appellant,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

NOV 15 1954



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

No. 28988R

WILLIAM RADOVICH,

Plaintiff,

vs.

NATIONAL FOOTBALL LEAGUE, BERT
BELL, J. RUFUS KLAUANS, BOSTON
YANKS, NEW YORK RANGERS, NEW
YORK GIANTS CLUB, PHILADELPHIA
EAGLES, THE LOS ANGELES RAMS
FOOTBALL CLUB, INC., PITTSBURGH
STEELERS FOOTBALL CLUB, WASH-
INGTON REDSKINS, CHICAGO BEARS
FOOTBALL CLUB, INC., CHICAGO CAR-
DINALS FOOTBALL CLUB, DETROIT
LIONS FOOTBALL CLUB, GREEN BAY
PACKERS, SAN FRANCISCO CLIPPERS,
DOE ONE, DOE TWO, DOE THREE, DOE
FOUR, DOE FIVE, DOE SIX, DOE SEVEN,
DOE EIGHT, DOE NINE AND DOE TEN,

Defendants.

COMPLAINT

The above-named plaintiff brings this action
against the above-named defendants, and for claim
of relief, he complains and alleges as follows:

I.

Jurisdiction and Venue

1. This complaint is filed and these proceedings

are instituted against the above-named defendants under Sections 15 and 26 of Title 15 U.S.C.A., being a part of the Act of Congress of July 2, 1890, c.649, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act and the Clayton Act.

2. Each of the corporate defendants transacts business, maintains offices and may be found in San Francisco, California.

II.

Description of the Parties

3. William Radovich, a resident of the City of Los Angeles, State of California, is a professional football player. He played football for the University of Southern California up to 1937 and in 1936 and 1937 was chosen "All Coast Guard." From 1938 to 1941, he played with the Detroit Lions of the National League. He entered the Navy in July of 1942 and played with the Great Lakes Service team for the 1942 season. In that year, he was selected as one of the guards on the All Service Team. Upon his discharge from the Navy, he rejoined the Detroit Lions. At the end of the 1945 season, he was unanimously selected by Associated Press, United Press, and the International News Service as "All-Pro Guard."

4. The defendant National Football League, hereinafter referred to as National League, was

organized as the American Professional Football Association at Akron, Ohio on April 30, 1921. On June 24, 1922, its name was changed to the National Football League. On April 12, 1940, its membership fee was set at Fifty Thousand Dollars (\$50,000). On January 13, 1946, the National League organized three minor leagues which it called: the American League, the Dixie League and the Pacific Coast League. The Pacific Coast League of the National League includes the Hawaiian Warriors, the Salt Lake City Seagulls, the Los Angeles Bulldogs, now known as the Long Beach Bulldogs, and the San Francisco Clippers.

5. The following defendants are members of the National League. The status, whether corporate or associate, of these members is not known to the plaintiff except where indicated in their names. Upon discovery, the plaintiff will pray leave to amend this complaint to show the exact state of incorporation or association.

a. Boston Yanks, now in New York and known as the New York Rangers, owned by Ted Collins, Statler Office Building, Boston 16, Massachusetts.

b. New York Giants Club—J. V. Mara, President, 11 West 42nd Street, New York City.

c. Philadelphia Eagles—Alexis Thompson, President, 22 South 17th Street, Philadelphia, Pennsylvania.

d. The Los Angeles Rams Football Club, Inc.—

Daniel V. Reaves, President, 273 South Beverly Drive, Beverly Hills, California.

e. Pittsburgh Steelers Football Club—Arthur Rooney, President, 521 Grant Street, Pittsburgh 39, Pennsylvania.

f. Washington Redskins—George Marshall, President, 739 Ninth Street, N.W., Washington 1, D. C.

g. Chicago Bears Football Club, Inc.—George S. Halas, President, 233 West Madison, Chicago 6, Illinois.

h. Chicago Cardinals Football Club—Ray Benningson, President, 511 Plymouth Court, Chicago 5, Illinois.

i. Detroit Lions Football Club—D. Lyle Fife, President, 505 Park Avenue, Tuller Oil Building, Detroit 26, Michigan.

j. Green Bay Packers—Earl L. Lambeau, General Manager, City Stadium, Green Bay, Wisconsin.

6. The defendant Bert Bell is and has been for sometime past the Commissioner of the National League.

7. J. Rufus Klawans, a resident of the above district and division, is and for sometime past has been Commissioner of the Pacific Coast League of the National League.

8. The true names or capacities, whether corporate, associate or otherwise, of defendants Doe

One through Doe Ten are unknown to plaintiff and plaintiff therefore designates them by such fictitious names, and when their true names are discovered, this complaint will be amended accordingly.

9. Whenever it is hereinafter alleged in this complaint that any defendant corporation or association did any act or thing, such allegation shall be deemed to mean that the officers, agents, and employees of the said defendant authorized, ordered or did such act or thing for and on behalf of said defendant corporation while actively engaged in the management, direction, control and operation of the business affairs of said corporation.

III.

Nature of the Trade and Commerce Involved

10. The exhibition of professional football contests is directly tied in and connected with lucrative contracts for the interstate communication by radio and television of the playing of the games. The interstate communication by radio and television is not incidental to the exhibition of the game because the substantial remuneration involved in the said interstate communication is a significant portion of the gross receipts resulting from the exhibition of football contests. Football games are played on the basis of round robin schedules in Boston, New York, Washington, Philadelphia, Los Angeles, Pittsburgh, Chicago, Detroit, Green Bay and other metropolitan centers throughout the United States. During the football season, there is constant travel

by the ball players and managers between these cities. Prior to the opening of the season, the managing agents of the various teams make contracts with broadcasting and televising companies under the terms of which these companies agree to send across state lines play-by-play narratives or moving pictures of the games. They enter into contracts with the said companies by which for large payments they allow the companies to install suitable apparatus in the ball parks by means of which the companies transmit the narratives and pictures to the outside public. At the time of contracting, it is specifically agreed, understood and contemplated that the transmission of the narratives and pictures by broadcasting and television companies will include interstate communication.

11. The contracts with the broadcasting and television companies are mutual arrangements by which each club contributes its share to a common venture. The arrangements between the defendants and the broadcasting and television companies are not mere incidents of the business but are part of the business of professional football itself. Without the substantial sums of money derived by the defendants from the broadcasting, televising and the photographing of the games, the business of operating a professional football club would not be profitable. The playing of the games is essential to the interstate transmission by broadcasting and television. The contract hereinafter described between the football players and the defendants, including the so-

called "reserve clause" relate not only to the local exhibition of football games but necessarily as well to the interstate broadcasting and televising thereof.

IV.

The Combination and Conspiracy

12. Beginning in or about the year 1938 and continuing without interruption thereafter up to and including the date of filing of this complaint, the defendants and others acting in concert with them have violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize, and by unlawfully contracting, combining and conspiring to restrain trade and commerce among the several states in the business of professional football and by conspiring to monopolize, control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States.

13. The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:

a. That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the National League:

b. That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than his original employer unless the employer consents.

c. That defendants agree that any player violating the reserve clause will be blacklisted by all clubs in the National League so that no club in the said National League may hire him.

14. To effectuate the aforesaid combination and conspiracy, and as a part thereof, the defendants throughout the period from 1938 to the date of the filing of this complaint, regularly and continuously did the things which they agreed to do, as aforesaid, and more specifically, among others, did the following things:

V.

The Boycotting and Blacklisting of Plaintiff

15. The plaintiff was All Coast Guard in 1936 and 1937 during which years he played on the varsity on the University of Southern California. In 1938 he joined the Detroit Lions. He played

with the Detroit Lions for the seasons of 1938, 1939, 1940 and 1941.

16. In July of 1942, plaintiff joined the Navy. For the 1942 season, he played with the Great Lakes Service team and was selected as guard on the All Service Team for that year.

17. In 1943, plaintiff did not play football but was Athletic Instructor, Chief Specialist of Athletics at the University of California at Los Angeles. He remained at U.C.L.A. from June, 1943, to March, 1945, when he transferred to the University of New Mexico as Line Coach.

18. Plaintiff was at Corona Naval Hospital in June, 1945, and was honorably discharged from the Navy in September, 1945, after thirty-eight months of service.

19. Upon his discharge from the Navy, the defendant Detroit Lions immediately arranged for his transportation to Detroit whereon the following season he played in the first game of the 1945 season, and throughout that season he averaged fifty-eight minutes of every game for the entire eleven-game series. At the end of the season he was selected unanimously by the Associated Press, the United Press, and International News Service as All-Pro Guard.

20. During all of period of time in which the plaintiff was with the Detroit Lions, he was forced, as all professional football players are forced, to

sign the uniform contract containing the reserve clause.

21. On Christmas Eve, 1945, Don Ameche, then president of the Los Angeles Dons, telephoned the plaintiff and inquired whether plaintiff was interested in playing for the Los Angeles Dons. Plaintiff answered in the affirmative and thereafter negotiated a contract with the Los Angeles Dons with Edward "Slip" Madigan. The contract was negotiated in January, 1946, for a two-year period at a salary of Six Thousand Five Hundred Dollars (\$6,500) for each year.

22. The Detroit Lions paid plaintiff only Three Thousand Two Hundred Fifty Dollars (\$3,250) under the 1945 contract. During the 1945 season, plaintiff was informed by Fred Mandel, then owner of the Detroit Lions, that he would receive a bonus for playing time per game which should have been Five Hundred Dollars (\$500) over the contract. It was in the 1945 season that he was unanimously chosen on the All-Pro Team. It is customary for a player receiving such an honor to receive a further bonus from his club. The Chicago Bears has paid their All-Pro members a One Thousand Dollar (\$1,000) bonus. Fred Mandel promised plaintiff that he would be given a substantial bonus, but he received from Lewis Cromwell, the manager, only Four Hundred Dollars (\$400) for both of the aforementioned earned bonuses.

23. Before signing with the Los Angeles Dons, plaintiff had asked Mandel of Detroit Lions to be

traded to the Los Angeles Rams, a member of the National League, when the said Rams transferred to Los Angeles from Cleveland, but Mandel, relying on the uniform contract of the National League, refused to do so. At the time plaintiff told Mandel that he desired to be transferred to Los Angeles, within the framework of the National League contract, because his father had been stricken with a dangerous affliction and had been operated on at St. Joseph's Hospital on July 12, 1945, and it was necessary for plaintiff to remain close by for the purpose of aiding and assisting his father. Mandel continued to refuse to transfer plaintiff to Los Angeles relying on the coercion of the blacklisting, boycotting and banning of plaintiff from the business of organized football.

24. In early September of 1946, Mandel of Detroit Lions came to California and after plaintiff's first game with the Los Angeles Dons against the Miami Seahawks, Mandel told plaintiff that he had breached his contract with the Detroit Lions and must return. Plaintiff again asked Mr. Mandel to be traded to the Los Angeles Rams so he could stay in Los Angeles because of his father's health, who had been operated upon a second time on August 31, 1946, at the Queen of the Angeles Hospital in Los Angeles. However, fearing the consequences of a ban and still cognizant of the necessity of earning more money so that Plaintiff could care for his father and family, Plaintiff offered to go back to play for the Detroit Lions if they would give him

the same amount of money as he was receiving from the Los Angeles Dons, namely Six Thousand Five Hundred Dollars (\$6,500) a year. Mandel refused to meet this offer and instead gave plaintiff an ultimatum that he return to Detroit for the first League game or suffer the penalties, boycotts and blacklisting imposed by the National League. Plaintiff refused to be bullied by Mandel and played with the Los Angeles Dons for the 1946 season.

25. The Los Angeles Dons was not a team of the National League but a team of the then organized All America Conference. The All America Conference was a rival to the National League, and part of the combination, conspiracy and monopoly heretofore alleged has consisted of agreements by the defendants to boycott and, if possible, ruin the All America Conference so that the business of organized football would remain the monopoly of the National League.

26. Plaintiff played the 1946 season with the Dons and at the end of the season was selected as All-Pro Guard by Associated Press.

27. In 1947, plaintiff played all season with the Los Angeles Dons, the contract terminating in April of 1948. He received honorable mention for All-Pro Team but had sustained an injury which prevented his playing full time.

28. At the start of the 1948 season, plaintiff was contacted by William Howard, coach of the San Francisco Clippers of the National League. Mr.

Howard desired to employ plaintiff as a combination coach and player at a salary of Five Thousand Dollars (\$5,000) per year. He told plaintiff that he was so employed. The defendants, in the meantime, had caused blacklists to be published throughout the country directly notifying all the members of the National League, including the members of the Pacific Coast Division, that severe penalties would be imposed against any team hiring or employing plaintiff. In the San Francisco area, the blacklisting was accomplished through the defendant J. Rufus Klawans. Mr. Howard was informed by his superiors that while the San Francisco Clippers desired to employ plaintiff, the club would be unable to do so so long as the blacklisting by the National League was in effect. Accordingly, Howard informed plaintiff that because of the National League ban and boycott and blacklisting, he would not be able to employ him at Five Thousand Dollars (\$5,000) a year as agreed.

29. Plaintiff has made repeated requests to defendant Bert Bell to remove the ban, boycott and blacklisting imposed against plaintiff for signing with the Los Angeles Dons of the All America Conference in 1946. The defendant Bert Bell has steadfastly refused to do so.

30. The said boycott, ban and blacklisting remains in effect as of the present time.

VI.

Effect of the Combination, Conspiracy
and Monopoly in Restraint of Trade

31. By reason of the aforesaid violations of the anti-trust laws, defendants have injured the business of plaintiff by actively eliminating him from the business of organized football; they have suppressed competition and have monopolized the business of organized football; they have eliminated competition among themselves and prevented new competition; they have sought to impair the competition of the All America Conference; they have effectively placed all football players within their control in a condition of bondage through use of the uniform contract of the National League.

32. The injury to plaintiff was directly intended by defendants and was caused by the monopolistic practices herein alleged, and the said injury resulted in the damaging of plaintiff in the sum of Thirty-five Thousand Dollars (\$35,000).

Wherefore, plaintiff prays judgment as follows:

1. That summons issue to each of the defendants commanding it to answer the allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That plaintiff receive with interest as damages for the injury to his business the sum of Thirty-five Thousand Dollars (\$35,000), and that

the said sum be trebled to One Hundred Five Thousand Dollars (\$105,000), and that the Court award a reasonable attorneys' fees, all in accordance with Section 4 of the Clayton Act (15 U.S.C.A. 15) in such cases made and provided.

3. That the aforesaid combination and conspiracy, contract, agreements, arrangements and understandings in restraint of interstate commerce, conspiracy to monopolize, attempts to monopolize and monopolization of interstate commerce be adjudged and decreed to be unlawful, and that the contracts, agreements, arrangements, understandings and practices alleged in this complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

4. That the Court adjudge and decree that the defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempted to monopolize and have monopolized the interstate trade and commerce in the business of organized football in violation of Sections 1 and 2 of the Sherman Act.

5. That the Court enjoin defendants from the further performance of contracts containing the so-called "reserve clause."

6. That the Court enjoin defendants from boycotting or blacklisting plaintiff.

7. That the Court issue a preliminary injunction compelling defendants to remove plaintiff from their blacklists.

8. That plaintiff recover his costs herein.

9. That plaintiff have such other and further relief as the Court may deem proper.

/s/ JOSEPH L. ALIOTO,

/s/ ELWOOD S. KENDRICK,

/s/ JOSEPH F. MURPHY.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

ANSWER

The defendant National Football League, reserving all of the rights urged in its motion to quash service of process and in its motion to dismiss, and the defendants, Chicago Cardinals Football Club, Inc., New York Football Giants Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club, answer the complaint of plaintiff on file herein and admit, deny and allege as follows:

1.

Answering paragraph 1 defendants and each of them deny that they or any of them have committed any acts prohibited by the Sherman Act or the Clayton Act or violated any provisions of the said acts.

2.

Answering paragraph 2 defendants and each of them deny that they or any of them transact business or maintain an office or offices or may be found in San Francisco, California, or within the jurisdictional limits of this Court.

3.

Answering paragraph 3 defendants and each of them admit that plaintiff played football with a professional football team owned by Fred L. Mandel, Jr., individually and doing business as Detroit Lions (hereinafter in this answer referred to as the Old Detroit Lions); that said Old Detroit Lions was a member of the National Football League and the plaintiff played football for said member during the seasons of 1938, 1939, 1940, 1941 and 1945; that said Fred L. Mandel, Jr., sold his franchise in the defendant National Football League to the Detroit Football Company on January 15, 1948; that at said time said defendant Detroit Football Company acquired the right to the use of the name Detroit Lions and said defendant Detroit Football Company now is a member of the defendant National Football League and is known as the Detroit Lions; that at the time said defendant Detroit Football Company acquired said franchise the plaintiff had already been suspended by the defendant National Football League, all as more particularly set out in this answer. Except as to the matter so admitted defendants and each of them are without knowledge

or information sufficient to form a belief as to the truth of the averments of paragraph 3 and basing their denial upon such ground defendants and each of them deny generally and specifically the averments not hereinabove admitted.

4.

Answering paragraph 4 defendants and each of them allege that National Football League is an unincorporated association which was organized as the American Professional Football Association at Akron, Ohio, during or about the year 1920, the exact date being unknown; that during or about the year 1922, the exact date being unknown, the name thereof was changed to National Football League; that upon application for admission to membership a prospective member is required to deposit with the league the sum of Twenty-five Thousand Dollars (\$25,000) and an additional sum of like amount upon approval of the application. Defendants and each of them deny that the National Football League organized the American League, Dixie League or Pacific Coast League, or any other league or leagues either on January 13, 1946, or at any other time, or at all; defendants and each of them have no knowledge or information about or on the identity or names of the members of the Pacific Coast League and basing their denial upon that ground deny that the teams named in paragraph 4 of plaintiff's complaint were members of the Pacific Coast League. Except as herein admitted defendants and each of them deny each and every,

all and singular, the allegations of paragraph 4 of plaintiff's complaint.

5.

Answering the allegations of paragraph 5 defendants and each of them aver that the members of the National Football League at the time of the filing of the complaint were as follows:

(a) Boston Yanks—A business owned and operated by Ted Collins individually and doing business as Boston Yanks with its principal office for the transaction of business in the Statler Building, Boston, Mass.

(b) New York Football Giants Club, Inc.—A business corporation organized and existing under the laws of the State of New York with its principal office for the transaction of business located at 11 West 42nd Street, New York City, New York.

(c) The Philadelphia Eagles, Inc.—A business corporation organized and existing under the laws of the State of New York with its principal office for the transaction of business located at 22 S. 17th Street, Philadelphia, Pa.

(d) Los Angeles Rams Football Club—A limited partnership consisting of and owned and operated by Messrs. Daniel F. Reeves, Edwin Pauley, Al Pauley, Fred Levy, Jr., and J. H. Seley, with the principal office of said limited partnership at 7813 Beverly Blvd., Beverly Hills, California.

(e) Pittsburgh Steelers Sports, Inc.—A business corporation organized and existing under the laws

of the State of Pennsylvania with its principal office for the transaction of business at 521 Grant Street, Pittsburgh, Pennsylvania.

(f) Washington Redskins Pro Football, Inc.—A business corporation organized and existing under the laws of the State of Maryland with its principal office for the transaction of business located at 739 Ninth Street, N.W., Washington, District of Columbia.

(g) Chicago Bears Football Club, Inc.—A business corporation organized and existing under the laws of the State of Illinois with its principal office for the transaction of business located at 233 West Madison, Chicago, Illinois.

(h) Chicago Cardinals Football Club, Inc.—A business corporation organized and existing under the laws of the State of Illinois with its principal office for the transaction of business located at 511 Plymouth Court, Chicago, Illinois.

(i) Detroit Football Company—A business corporation organized and existing under the laws of the State of Michigan with its principal office for the transaction of business located at 505 Park Avenue, Tuller Oil Building, Detroit, Michigan.

(j) Green Bay Packers, Inc.—A business corporation organized and existing under the laws of the State of Wisconsin with its principal office for the transaction of business located at 349 S. Washington Street, Green Bay, Wisconsin.

That the present membership of the defendant National Football League is the same as it was at the time of the filing of the complaint in this action except as follows:

(a) The Boston Yanks have changed their name to New York Yanks; said team is still owned by Ted Collins individually and now does business as New York Yanks in New York with its principal office for the transaction of business at 4 W. 62nd Street, New York City, N. Y.

(b) Cleveland Browns Football Club—A business corporation organized and existing under the laws of the State of Ohio with its principal office for the transaction of business located in the Leader Building, Cleveland, Ohio.

(c) San Francisco 49ers—A limited partnership consisting of Anthony J. Morabito and Victor P. Morabito doing business as San Francisco 49ers with its principal office for the transaction of business in the Phelan Building, San Francisco, California.

Except as herein averred defendants and each of them deny generally and specifically the allegations of paragraph 5.

6.

Answering paragraph 6 defendants and each of them admit the allegations therein set forth.

7.

Answering paragraph 7 defendants and each of them aver that they and each of them are informed

and believe that the allegations therein set forth are true.

8.

Answering paragraph 8 defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

9.

Answering paragraph 9 defendants and each of them deny generally and specifically all of the allegations of said paragraph other than allegations indicating the intention of the pleader.

10.

Answering paragraph 10 defendants and each of them aver that each of the members of the defendant National Football League leases a football stadium within the city which it represents and that in said stadium its team performs and engages the teams of the other clubs of its league in regularly scheduled league games for which admission is charged; that some of said games are played for profit and others are played at a loss; that rights to broadcast descriptions of some football games have been granted by some members of the National Football League clubs to other persons and that some broadcasts and some telecasts of descriptions of football games are transmitted across state lines; that broadcasts and telecasts of descriptions of football games, and the granting of the rights to broad-

cast and telecast such descriptions are merely incidental to the playing of the game in the local stadium of the member and are in no way necessary for, or a part of the playing or holding of football games or contests; that rights to broadcast or telecast descriptions of football games are sometimes purchased by corporations which are engaged in interstate commerce, and that the contracts under which such corporation purchases such rights usually provide for the right to broadcast or telecast some or all of the regularly scheduled league games of the member clubs when and if played.

The defendants and each of them further aver that the revenue derived by the member clubs in the league for the right to broadcast or telecast the game is not substantial and is relatively small compared to the receipts derived from the patrons attending the game itself.

Defendants and each of them aver that the playing season of the National Football League extends from about the middle of July to the middle of December with a prearranged schedule whereby each member team is scheduled to play approximately five games at home and five games at the home grounds of five of the other league members; that in addition member teams are permitted to and actually do engage in the playing of exhibition games during the training season which extends from approximately the middle of July to the beginning of October; that during October, November and a part of December the regular league play is

conducted; that in playing the schedule for each season each member club, when playing as a visting club, transports at its own expense its playing equipment and player personnel across state lines to such an extent and at such times as are necessary to enable it to reach the place at which the scheduled games are played. Except as herein admitted defendants and each of them deny generally and specifically the allegations of paragraph 10.

11.

Answering paragraph 11, defendants and each of them restate each and all of the allegations contained in paragraph 10 of this answer as fully and with the same force and effect as if herein restated at length. Defendants and each of them deny that without the income from contracts permitting radio broadcasts, telecasts and photographs of the games, a professional football team could not operate profitably, and in this connection allege that many defendant teams did operate profitably for many years without any radio, television or photography whatsoever; that the income from said sources is a mere incident to the main operation of the defendant clubs—namely the playing of the game itself before actual spectators and at parks and stadiums provided for that purpose; that the playing of said game is purely a local affair and depends for the most part on the support and following of the members of the public residing in the community in which the stadiums are located and in the city

which the individual team in that community represents or purports to represent. The business of each of the defendants, except defendant National Football League, is giving exhibitions of major league professional football; all contests and exhibitions of football are held either wholly within the stadium owned or leased by the individual defendant member situate in the state in which it has its principal office for the transaction of business, or wholly within the stadium of the opposing member; said stadiums and each of them in which these defendants and each of them have engaged at all times herein mentioned in exhibitions of professional football are wholly within the physical limits of the state in which the respective stadium is situate, and each exhibition of professional football is played within the same stadium in which it is begun; the presentation of exhibitions of professional football of the character in which the defendant member teams have engaged at all times herein mentioned requires that each player engaged therein, maintain and exhibit a high standard of physical fitness and have and maintain a highly specialized knowledge and skill in playing professional football; the employment of all players is determined by their special knowledge, skill and ability as football players and by their physical condition.

The defendant National Football League is an unincorporated association consisting of the member teams described in paragraph 5 of this answer; it

is presided over by one Bert Bell as Commissioner of said National Football League and said defendant National Football League, through said Bert Bell as Commissioner, conducts the business of the National Football League in its day-to-day operation; that the principal office for the transaction of business of said defendant National Football League is located at 1518 Walnut Street, Philadelphia, Pennsylvania.

Except as herein asserted, defendants and each of them deny each and every, all and singular the allegations of paragraph 11.

12.

Defendants and each of them deny that they or any of them have at any time committed any acts forbidden by Sections 1 and 2 of the Sherman Act; deny further that they or any of them have at any time violated any of the aforesaid sections of the Sherman Act, and deny that any act of these defendants has at any time damaged plaintiff.

13.

Answering paragraph 13, defendants and each of them allege that professional football in the National Football League is played pursuant to agreements and rules adopted by the member clubs from time to time to regulate and conduct an orderly and competitive exhibition of professional football among its members; that one of the rules adopted by the defendant National Football League is that

each player sign a uniform players' contract prepared and adopted by the defendant National Football League; that defendants and each of them admit and aver that all agreements, players' contracts and rules made for the conduct of professional football have resulted from thirty years of practical experience in professional football and are responsible for the successful development of the present high standards of honesty and integrity and the public confidence which has made American football a great national sport; and that the agreements, player contracts and rules made for the conduct of professional football are designed and are intended, and are effective to promote and maintain the highest degree of competition between teams, to promote the development of skilled players and to afford to them increased opportunities to advance in their profession and in their earning power, to preserve the honesty and integrity of the game, and to maintain confidence in the game of football on the part of the public and all those participating in professional football. The defendants further aver that said agreements, player contracts and rules are necessary, reasonable and effective for the accomplishment of the foregoing objectives and that their use furthers both the public interest and that of the players and of all others employed or participating in professional football.

Defendants and each of them further admit that professional football as played in the National Football League does not consist of an isolated profes-

sional football team playing haphazardly with other teams; that the competition between member teams is conducted pursuant to prearranged schedules which are not round-robin in nature; that such schedules provide for team competition in which the public is interested; that being a team game, football must have rules and regulations as to how and when the game shall be played and who shall play it; that the defendant National Football League at all times herein mentioned did have rules and regulations covering the rights and obligations of the members and the players of the members; that one of the rules in effect in the National Football League since 1946 provided in effect that if any player violates his contract with a member team he is automatically suspended for five (5) years; that these defendants admit that in 1946 after Radovich signed a contract with the Los Angeles Dons, as aforesaid, he was automatically suspended by the defendant National Football League pursuant to its rules for a period of five (5) years; that such suspension was in effect at all times up to the date of the filing of the complaint in this action; that in that connection defendants and each of them allege that the playing of team games in accordance with a prearranged schedule and under rules defining the eligibility of the players under certain circumstances, is the common and general practice in the conduct of team sports, both amateur and professional and is necessary to provide fair and reasonable competition and to attract and maintain public interest in the sports; that, in order to attract suffi-

cient public patronage to make possible the playing of the game and to meet the just expectations of the public, football games must be played as part of regular schedules between independently-owned clubs which provide and maintain adequate physical plants and teams with adequate personnel so that the relative skills of the competing teams shall not be so disproportionate as to destroy the competitive character of the games; that it is in the interest of each club, its players and the public that each club shall have sufficient opportunity to provide and maintain a team with sufficient skill to make contests with competing clubs truly competitive; that, among other things, each club has a manager, coaches, trainer and publicity man for its players and, in so doing, devotes time, money and effort to increasing the skill, reputation and customer drawing power of the players and to protecting their health and welfare, with great benefit to the players and the public; that that it is of the highest importance to the club, the players and the public that the game shall be played under such conditions and regulations that the game's competitive character and the integrity of the game and of football as a whole shall be beyond question in the minds of the public. Except as so admitted, each and every averment of paragraph 13 of the complaint is denied.

14.

Answering paragraph 14 defendants and each of them deny generally and specifically the allegations therein contained.

15.

Answering paragraph 15 defendants and each of them admit that plaintiff played with the "Old Detroit Lions" for the seasons of 1938, 1939, 1940 and 1941 and aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information deny generally and specifically the allegations not admitted.

16.

Answering paragraph 16 defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and basing their denial upon such lack of information deny generally and specifically the allegations of said paragraph.

17.

Answering paragraph 17 defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and basing their denial upon such lack of information deny generally and specifically the allegations of said paragraph.

18.

Answering paragraph 18 defendants and each of them aver that they and each of them are without

knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and basing their denial upon such lack of information deny generally and specifically the allegations of said paragraph.

19.

Answering paragraph 19 defendants and each of them admit that plaintiff played for the "Old Detroit Lions" during the 1945 season, aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph and basing their denial upon such lack of information deny generally and specifically the allegations not admitted.

20.

Answering paragraph 20 defendants and each of them admit that the services of plaintiff were contracted for by the "Old Detroit Lions" upon the common form of contract containing the usual option for renewal and with these exceptions defendants and each of them deny generally and specifically the allegations of said paragraph.

21.

Answering paragraph 21 defendants and each of them deny generally and specifically the allegations therein contained.

22.

Answering paragraph 22 defendants and each of them admit that the salary provided in the contract

of plaintiff and the "Old Detroit Lions" for the 1945 season was the sum of Three Thousand Two Hundred Fifty Dollars (\$3,250) and with this exception defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information defendants and each of them deny generally and specifically the allegations not admitted.

23.

Defendants and each of them aver that on or about the 20th day of September, 1945, plaintiff entered into a contract with Fred L. Mandel, Jr., an individual doing business as "Old Detroit Lions" of defendant National Football League, wherein he agreed to render services as a football player to the "Old Detroit Lions" during the 1945 season; that the contract further gave the "Old Detroit Lions" an option on plaintiff's services as a player for the following season of 1946, which option was one of the material inducements for the "Old Detroit Lions" to enter into the contract with the plaintiff; that plaintiff accepted said employment and entered upon his duties as a football player pursuant to the term of his contract; that plaintiff was so employed by the "Old Detroit Lions" and received compensation therefor pursuant to said contract until on or about January 31, 1946, when plaintiff left the employ of the "Old Detroit Lions" and

thereby breached his contract in that he then and thereafter failed and refused to continue his employment and voluntarily and without the consent or approval of the "Old Detroit Lions" or the defendant National Football League, or any officer or agent thereof, entered into a written agreement to play, and did play football in Los Angeles for the 1946 and 1947 seasons with Southern California Sports, Inc., a California corporation, doing business under the name and style of Los Angeles Dons; that said Los Angeles Dons were likewise engaged in the playing of professional football as a member of another league of professional football teams known as the All America Football Conference; that such services performed by plaintiff for the Los Angeles Dons were for a money consideration; defendants aver that pursuant to the league rules plaintiff was thereupon automatically declared ineligible by the Commissioner of the National Football League to play football for any member of the National Football League for a period of five (5) years for violating his contract with the "Old Detroit Lions" as aforesaid. Except as herein averred defendants and each of them deny generally and specifically the allegations of paragraph 23.

24.

Answering paragraph 24 defendants and each of them admit that plaintiff played with the Los Angeles Dons during the 1946 season, deny that any penalty or boycott or blacklisting was imposed by

the defendant National Football League and with these exceptions defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information defendants and each of them deny generally and specifically all of the allegations not admitted or positively denied.

25.

Answering paragraph 25 defendants and each of them admit that the Los Angeles Dons was not a team of the National Football League, but was a member of the All America Football Conference, admit that open and unrestrained competition existed in the business of professional football and with these exceptions deny generally and specifically the allegations of said paragraph.

26.

Answering paragraph 26 defendants and each of them admit that plaintiff played with the Los Angeles Dons during the 1946 season; defendants have no knowledge or information sufficient to form a belief as to the balance of the allegations of said paragraph 26 of said complaint and basing their denial thereon, deny each and all of the remaining allegations of said paragraph.

27.

Answering paragraph 27 defendants and each of them admit that plaintiff played with the Los An-

geles Dons during the 1947 season and aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial thereon, deny each and every, all and singular the remaining allegations of said paragraph 27 of said complaint.

28.

Answering paragraph 28 of said complaint defendants and each of them deny that there is any such team as the San Francisco Clippers of the National Football League; that if such a team does exist it is not now, nor has it ever been a member, affiliate, agent or representative of the defendant National Football League, nor connected with it in any manner whatsoever; defendants and each of them admit the existence in 1948 of a professional football team operating in San Francisco and Oakland primarily known as the San Francisco Clippers; that said San Francisco Clippers were members of a league operating only on the Pacific Coast and in Honolulu known as the Pacific Coast League; that such Pacific Coast League was at all times herein mentioned known by these defendants and the public generally as a minor league; that such team known as the San Francisco Clippers was not at any time a member of defendant National Football League, nor was it ever owned, controlled or directed in any manner by any member of the defendant National Football League, nor the National

Football League itself; neither was it an agent, subsidiary, representative or affiliate at any time of the defendant National Football League, nor of any of its members, owners or representatives; that the San Francisco Clippers and the Pacific Coast League, of which it was a member, operated and conducted itself as an entirely separate and distinct entity from the defendant National Football League; it had no interest therein nor any participation or connection therewith, but was completely independent and free from any relation to and with said National Football League; it had its own members, its own officer or officers, its own commissioner, its own rules and regulations, operated in different communities for the most part, its own players and coaches, its own form of contract, its own playing rules, leased its own stadia and in general was completely and wholly independent of the National Football League and its members and was not affiliated with said National Football League or its members in any manner whatsoever. That neither said Pacific Coast League, nor any of its members, was at any time a division of the defendant National Football League, nor has the defendant National Football League ever had a Pacific Coast Division at any time; defendants and each of them admit that in 1948 one William Howard was the coach of the San Francisco Clippers, but defendants have no knowledge of the details thereof, nor did they or any of them have any connection, arrangement or contract with him in any manner or of any nature whatsoever.

Defendants and each of them deny that they or any of them ever caused blacklists to be published throughout the United States or otherwise notifying league members, or the Pacific Coast League, that any penalties would be exacted or imposed against any team or person hiring or employing plaintiff; defendants deny further that defendant J. Rufus Klawans assisted, aided or carried out, or in any manner established or created such a blacklist against plaintiff preventing or impeding his playing as a football player in the Pacific Coast League or otherwise; defendants have no knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information defendants and each of them deny generally and specifically the allegations not admitted.

29.

Answering paragraph 29 defendants and each of them deny generally and specifically the allegations of said paragraph.

30.

Answering paragraph 30 defendants and each of them deny that any boycott or ban or blacklisting against plaintiff by the defendant National Football League, or any of its members is or ever was in effect.

31.

Answering the allegations of paragraph 31 defendants and each of them deny that by reason of

any of the allegations of plaintiff's complaint on file herein, or by reason of any other action, conduct, combination, conspiracy between defendants, or any of them, or by reason of any other actions or reasons whatsoever, any or all of the defendants have damaged or injured the plaintiff in any manner whatsoever, either by eliminating him from the business of organized football or otherwise; that actually when plaintiff breached his contract with the "Old Detroit Lions" in January, 1946, and signed a new contract with the Southern California Sports, Inc., doing business as Los Angeles Dons, he increased his salary from Three Thousand Two Hundred Fifty Dollars (\$3,250) per year called for in his "Old Detroit Lions' " contract to Six Thousand Five Hundred Dollars (\$6,500) per year in the Los Angeles Dons' contract, plus a One Thousand Dollar (\$1,000) bonus for signing, plus a two-year non-cancellable contract; that plaintiff during the years 1946 and 1947 did receive said sums from the Los Angeles Dons for playing football, said sums representing a 100% increase in salary to plaintiff for each season above the amount for which plaintiff had contracted to play with the "Old Detroit Lions"; that plaintiff entirely ignored, and arbitrarily and capriciously breached his contract with the "Old Detroit Lions"; that said contract was signed and executed by plaintiff freely and voluntarily and plaintiff retained and enjoyed the benefits of such breach of contract during the seasons of 1946 and 1947 without hindrance, interference or complaint from the defendants or any of them;

that in the 1948 season plaintiff attempted to sign a new contract with the Los Angeles Dons, but it refused so to do because plaintiff no longer possessed the physical and mental ability sufficient to qualify him to play major league professional football; that plaintiff was rejected as unfit for play by the Los Angeles Dons, and by each other member team in the All America Football Conference; that the services of plaintiff were offered to each member of the All America Conference in 1948; that no member thereof sought his services and he was thereupon waived out of the All America Conference and made a free agent; that upon becoming a free agent plaintiff became possessed with the idea that a team of defendant National Football League might be interested in signing him as a player for 1948; that plaintiff made several efforts to interest member teams of the defendant National Football League in his services for 1948 to no avail; that at said time and continuously thereafter plaintiff no longer possessed the physical and mental ability in sufficient degree to compete as a member of a professional football team in the defendant National Football League, or in any other league of major league caliber; that plaintiff well knew such fact; that plaintiff thereupon in the summer of 1948 sought to elicit an offer from a member team in the Pacific Coast League as a professional football player; that at all times herein mentioned defendant Pacific Coast League and its member teams were of minor league caliber as compared to the defendant

National Football League and the All America Football Conference; that its players consist primarily of players either previously released by the defendant National Football League or All America Conference, or players not possessing sufficient ability to warrant a contract with any member of said major leagues; that the schedules were limited, the salaries much smaller than that of major league players, the spectator appeal much less, the revenue at the gate, or by radio or television much smaller and in most cases the players were persons who worked at other positions during the season to assist in their support and practiced football at night after work, playing their games in small communities on Sundays; all of said facts were well known to plaintiff in 1948 and at all times herein mentioned; that plaintiff knowing he no longer possessed the ability to obtain a contract with a major league team sought work as an employee of the San Francisco Clippers at a salary of approximately Fifty Dollars (\$50) per game and an estimated season of approximately ten (10) games; that plaintiff was unable to obtain employment by the San Francisco Clippers at said sum or on any terms whatsoever for reasons unknown to defendants or any of them. That the failure of plaintiff to obtain employment with the San Francisco Clippers as aforesaid was not due in any manner to any action of defendants or any of them to or with each other or to or with the defendant Pacific Coast League or any of its members, employees or representatives.

That defendants and each of them are informed

and believe and relying thereon allege that plaintiff thereafter in 1948 and 1949 obtained employment as a professional football player in the Dominion of Canada and actually played therein for compensation in the 1948 and 1949 season upon terms and on conditions, the precise terms of which are unknown to defendants or any of them, but generally on a comparable basis to that being received by plaintiff during the time he played in the United States for defendant National Football League and the All America Conference; that none of these defendants at any time interfered with or sought to impede, interfere with or prevent plaintiff from so doing, but took no action in regard thereto whatsoever; that beginning after 1947 no team in the National Football League, or in the All America Conference, had any interest in signing the plaintiff as a player in either league because of the decline in his ability and his advanced age; that plaintiff was born June 24, 1915, and at the close of the 1947 football season was over thirty-two (32) years of age; all of said facts were known to the defendants and each of them, and to all of the members of the All America Conference, and in great part influenced the actions of the teams in said National Football League and the All America Conference in not seeking his services.

That except as herein admitted, defendants and each of them deny each and every, all and singular, the allegations contained in paragraph 31 of plaintiff's complaint.

32.

Answering paragraph 32 defendants and each of them deny generally and specifically the allegations of said paragraph, deny that any injury to plaintiff was intended or caused by defendants or any of them, deny that any monopolistic practice was engaged in by defendants, or any of them, and deny that plaintiff has been damaged in the said sum of Thirty-five Thousand Dollars (\$35,000), or in any sum or at all.

And as and for a Second, Separate and Distinct Answer and Defense, defendants and each of them allege:

33.

That the defendant National Football League is an unincorporated association with its principal place of business in the State of Pennsylvania, and that said defendant has no office and transacts no business and cannot be found within the jurisdictional limits of this Court.

And as and for a Third, Separate and Distinct Answer and Defense, defendants and each of them allege:

34.

That Bert Bell, who is named as a defendant in this action, resides in the State of Pennsylvania and does not have any office or residence or transact any business within the jurisdictional limits of this Court. The said Bert Bell is not amenable to the

process of this Court, could not be sued upon this alleged cause of action in this District without his consent, and is an indispensable party to the maintenance of this alleged cause of action.

By Way of a Further and Affirmative Defense to plaintiff's complaint on file herein, these answering defendants allege:

That at all times herein mentioned within the period from 1946 to the date of the filing of the complaint in this action, keen, active and aggressive competition existed for plaintiff's services as a professional football player; that during said period there was operating a second major league of professional football known as the All America Conference; that said All America Conference was an unincorporated association of eight (8) professional football teams of major league caliber exhibiting and playing professional football of the same grade, class and style as the National Football League and in open, declared, unrestrained competition with the National Football League both for public acceptance, publicity, revenue, players, stadiums, radio and television terms and contracts, coaches, managers and each and every facet of professional football; that within said period said All America Conference operated teams in direct and unrestrained competition with the National Football League in New York, Chicago, Los Angeles, San Francisco, Cleveland, Buffalo, Baltimore, Brooklyn, and as predecessor to Baltimore for the year 1946, in

Miami, Florida; that each team in the All America Conference carried thirty-three (33) football players, employed coaches of national repute, engaged scouts and assistants, competed for players, and in general resorted to every conceivable device and practice to lure patrons to the games and important and skillful players to their roster; that said All America Conference and its members had no agreements or understandings with the National Football League or its members of any kind or nature relating to the plaintiff or otherwise; that the plaintiff's services were solicited and procured by the Los Angeles Dons as a member of the All America Conference at a time when plaintiff was under contract to the "Old Detroit Lions" of the defendant National Football League; that plaintiff possessed in 1946 and 1947 special and unique talent as a professional football player; that plaintiff's talent and that of other squad members was at that time a valuable property to the holder thereof; that plaintiff had given an option on said services for 1946 to the "Old Detroit Lions" for a valuable consideration, to wit, the payment in 1945 of Three Thousand Two Hundred Fifty Dollars (\$3,250); that in his contract plaintiff agreed with the "Old Detroit Lions" that it would have until August 1, 1946, to exercise its option for plaintiff's services in 1946; that plaintiff repudiated said contract and breached the same wilfully and intentionally and thereupon signed a new contract with the Southern California Sports, Inc., doing business as Los Angeles Dons; that plaintiff has not at any time performed all

things required by him to be performed under his contract with "Old Detroit Lions"; that plaintiff at all times since January 1, 1946, has been and still is in default under said contract with the "Old Detroit Lions."

By Way of a Further and Separate Defense, defendant National Football League avers that plaintiff is not entitled to injunctive or any equitable relief against defendants or any of them in that plaintiff wilfully and intentionally breached his contract as aforesaid with the defendant "Old Detroit Lions" by signing a new contract with the Los Angeles Dons and thereafter refusing to perform any further services under his contract with the defendant "Old Detroit Lions"; that by such action plaintiff has been guilty of unclean hands and has acted without equity and directly in violation of equitable principles.

As a Further Separate Defense defendants and each of them allege that plaintiff is not entitled to injunctive or any other equitable relief against defendants or any of them in that plaintiff himself has not acted equitably in connection with each and all of the matters set out in his complaint in that plaintiff signed a contract to play professional football for the "Old Detroit Lions" in 1945 and gave an option to said "Old Detroit Lions" for his services in 1946 in exchange for a valuable consideration, all of which plaintiff accepted and received; that thereafter plaintiff without cause or provocation breached said contract and repudiated his

option agreement with "Old Detroit Lions," retaining the entire consideration theretofore received to the damage and injury to the "Old Detroit Lions"; that thereafter plaintiff played professional football for a competitive organization for two years and was injured while so doing rendering him unfit for further adequate services as a major league professional football player, both because of said injury and because of the fact that at the time of the breach by plaintiff he possessed only two more seasons of potential play because of his advanced age; that when plaintiff could no longer peddle his services to the All America Conference plaintiff sought employment by defendant National Football League and its members and those affiliated with defendant National Football League; that said defendant National Football League had suspended plaintiff due to his conduct, as aforesaid; that plaintiff seeks to have this court enjoin and restrain said suspension despite his failure to act and do equity in his relations with the "Old Detroit Lions" as a member of the defendant National Football League; that all equitable relief should be denied plaintiff and that plaintiff has failed to do equity in the matters related as aforesaid.

And as and for a Special Answer and Objection to the prayer of plaintiff invoking the injunctive powers of this Court defendants and each of them deny that any cause or reason now exists, if such ever did, for the relief requested and in this connection defendants and each of them aver that plain-

tiff is not now qualified to play professional football, that the Pacific Coast Football League is now disbanded and the San Francisco Clippers, the alleged prospective employer of plaintiff, is no longer in existence, and that none of these defendants are now committing any act which directly or indirectly affects any right of plaintiff.

And as and for a Further Special Answer and Defense defendants and each of them allege that plaintiff on the 20th day of September, 1945, made and entered into a contract in writing with the "Old Detroit Lions" whereby plaintiff agreed to render services to the said club; that as part of said contract plaintiff agreed that any dispute between plaintiff and the said club arising out of said contract should be referred to the Commissioner of the National Football League and that the decision of said Commissioner would be accepted by both parties as final; that in recognition of said provision of the said contract plaintiff on April 25, 1949, addressed a letter to the Commissioner of the National Football League setting forth the matters and things complained of in complaint of plaintiff on file herein, and requesting a hearing relating to said dispute; that in response to said request the said Commissioner by letter dated April 27, 1949, advised plaintiff that he was willing to meet with plaintiff at a time and place convenient to plaintiff, but that despite such agreement of the Commissioner plaintiff failed and neglected to present himself for such hearing and failed and neglected to

make any attempt to effectuate such hearing or to refer the matter to the Commissioner for arbitration as in said contract agreed.

Wherefore, defendants and each of them demand judgment dismissing the complaint, and awarding to defendants and each of them the costs of this action.

/s/ M. E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Answering
Defendants.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
J. RUFUS KLAWANS

The defendant, J. Rufus Klawans, answers the complaint of plaintiff on file herein and admits, denies and alleges as follows:

I.

Answering paragraph 1, this defendant denies that he has committed any acts prohibited by the Sherman Act or the Clayton Act or violated any provisions of either of said Acts.

II.

This defendant admits the allegations contained in paragraph 2, insofar as he personally is con-

cerned, but otherwise denies each and every, all and singular, the allegations therein contained.

III.

Answering paragraph 3, this defendant is without sufficient information or belief to otherwise enable him to answer said paragraph and on said ground denies each and every, all and singular, the allegations therein contained.

IV.

Answering paragraph 4, this defendant alleges that the National Football League is an unincorporated association; denies that the Pacific Coast Football League was organized by the National Football League; in this latter connection, this defendant alleges that the Pacific Coast Football League was organized as an unincorporated association and, after eleven (11) years of operation, ceased doing business on the 14th day of May, 1949. At no time during the above periods did the Pacific Coast Football League have any connection with the National Football League, except as insofar as may be hereinafter particularly set forth, but at all times was wholly separate and independently functioning organization.

That at various times during the periods above set forth, the members of the Pacific Coast Football League were as follows:

Seattle-Tacoma, Wash.,

San Francisco,

Oakland,

Richmond,
San Jose,
Salinas,
Sacramento,
Los Angeles,
Hollywood,
Honolulu, T. H.,
Salt Lake City, Utah,
San Diego,
Portland, Oregon.

Other than as hereinabove specifically denied or as hereinafter specifically admitted, this defendant alleges that he is without sufficient information or belief to otherwise enable him to answer said paragraph and on said ground denies each and every, all and singular, the allegations therein contained.

V.

This defendant alleges he is without sufficient information or belief to otherwise enable him to answer the allegations contained in paragraph 5 and, basing his denials on said ground, denies each and every, all and singular, the allegations therein contained.

VI.

This defendant admits the allegations contained in paragraphs 6 and 7 of plaintiff's complaint, except that this defendant denies that the Pacific Coast Football League was a part of, affiliated with, or in any manner a part of the National Football League.

VII.

Answering paragraphs 8 and 9, this defendant is without sufficient information or belief to otherwise enable him to answer said paragraphs and, basing his denial on said lack of information and belief, denies each and every, all and singular, the allegations therein contained.

VIII.

This defendant denies each and every, all and singular, the allegations of paragraph 10, insofar as said allegations have reference to himself personally or to the Pacific Coast Football League.

Further answering said paragraph, and insofar as any revenue derived by the member clubs in the Pacific Coast Football League is concerned, the revenue from the broadcasting and telecasting of the games was relatively small compared to the receipts derived from the patrons attending the games itself; this defendant alleges that any arrangements made for broadcasting or telecasting individual games were matters exclusively within the jurisdiction of the individual clubs and the Pacific Coast Football League did not participate in the profits thereof or the revenue therefrom.

IX.

Answering paragraph 11, this defendant denies each and every, all and singular, the allegations therein contained, except as hereinabove or hereinafter specifically admitted.

X.

This defendant denies that he has at any time committed any acts forbidden by the Sherman Act, or any sections thereof, and denies further that he has violated said Act or damaged plaintiff, either in the manner or in the amounts alleged in said complaint or in any other manner or any other amount, or at all.

XI.

Answering paragraph 13, this defendant alleges that the Pacific Coast Football League, during the period of its existence, arranged for the playing of professional football pursuant to agreements and rules adopted by its member clubs from time to time to regulate and conduct an orderly and competitive exhibition of professional football among its members; that one of the rules adopted by the Pacific Coast Football League was that each player sign a uniform player's contract prepared and adopted by the Pacific Coast Football League; this defendant alleges that said agreements, player contracts and rules so adopted by the member clubs of the Pacific Coast Football League were necessary, reasonable and effective to accomplish the objective of a professional football league and were for the benefit of the public and the players and all persons employed or participating in the said professional football league.

That the Pacific Coast Football League did have rules and regulations covering the rights and obligations of the members and players of the members

and that one of the rules in effect during the period of the existence of the Pacific Coast Football League was to the effect that, if any one player violated his contract with a member team, he was subject to automatic suspension and other disciplinary action. In this latter connection, the player so disciplined had a right of appeal from the imposition of any penalty and the Commissioner was specifically authorized under the rules and regulations of said League to remit any fine or suspend any sentence imposed upon any player.

Except as herein admitted, this defendant denies each and every, all and singular, the allegations contained in paragraph 13 of plaintiff's complaint.

XII.

This defendant denies generally and specifically the allegations contained in paragraph 14 of plaintiff's complaint.

XIII.

Answering paragraphs 15 to 27, inclusive, of plaintiff's complaint, this defendant alleges that he is without sufficient information or belief to otherwise enable him to answer said paragraphs and, basing his denials on said ground, denies each and every, all and singular, the allegations contained in said paragraphs, and each of them.

XIV.

This defendant denies each and every, all and singular, the allegations contained in paragraph 28 of plaintiff's complaint.

XV.

Answering paragraph 29 of plaintiff's complaint, this defendant alleges that he is without sufficient information or belief to otherwise enable him to answer said paragraph and, basing his denial on said ground, denies each and every, all and singular, the allegations therein contained.

XVI.

Answering paragraph 30 of plaintiff's complaint, this defendant denies that any boycott, or ban or blacklisting of plaintiff by this defendant or the Pacific Coast Football League is, or was ever in effect.

XVII.

Answering paragraph 31 this defendant denies that by reason of any of the allegations of plaintiff's complaint on file herein, or by reason of any other action, conduct, combination, conspiracy between defendants, or any of them, or by reason of any other actions or reasons whatsoever, any or all of the defendants have damaged or injured the plaintiff in any manner whatsoever, either by eliminating him from the business of organized football or otherwise; that the failure of plaintiff to obtain employment with the San Francisco Clippers was not due in any manner to any actions of defendants, or any of them, to or with each other or to or with the defendant Pacific Coast Football League or any of its members, employees or representatives.

That except as herein admitted, this defendant denies each and every, all and singular, the allegations contained in paragraph 31 of plaintiff's complaint.

XVIII.

Answering paragraph 32, this defendant denies generally and specifically the allegations of said paragraph, denies that any injury to plaintiff was intended or caused by defendants or any of them, denies that any monopolistic practice was engaged in by defendants, or any of them, and denies that plaintiff has been damaged in the said sum of \$35,000.00, or in any sum or at all.

Wherefore, said defendant demands judgment dismissing the complaint and awarding to defendant the costs of this action.

/s/ J. BRUCE FRATIS,

Attorney for Said Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 26, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION TO CONTINUE TRIAL

To the Plaintiff above named and to his attorneys:

Please Take Notice that on Tuesday, January 20, 1953, at ten o'clock a.m., or as soon thereafter as counsel may be heard, defendants will move the

above-entitled court in the department of the Honorable George B. Harris, Room 276, United States Post Office Building, 7th and Mission Streets, San Francisco, California, for an order removing the above-entitled action from the trial calendar to be reset for trial immediately following the decision of the United States Supreme Court in the matter of George Earl Toolson vs. New York Yankees, Inc., et al.

This motion is based on the stipulation of counsel for the respective parties and upon the affidavit of John F. O'Dea, a copy of which is served herewith.

Dated: January 14, 1953.

/s/ MARSHALL E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

STIPULATION FOR REMOVAL OF ACTION FROM TRIAL CALENDAR

It Is Hereby Stipulated by and between the parties, that the above-entitled action may be dropped from the pending trial calendar to be reset for trial immediately following the decision of

the United States Supreme Court in the matter of George Earl Toolson vs. New York Yankees, Inc., et al.

Dated: January 14, 1953.

JOSEPH L. ALIOTO,
ELWOOD S. KENDICK,
JOSEPH F. MURPHY,

By /s/ JOSEPH L. ALIOTO,

Attorneys for Plaintiff.

/s/ MARSHALL E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Defendants.

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
CONTINUANCE OF TRIAL

State of California,
City and County of San Francisco—ss.

John F. O'Dea, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant National Football League and other defendants in the above-entitled action; that the trial of the said matter is presently set for February 9, 1953,

before the Honorable District Court sitting with a jury;

That there has heretofore been decided by the Honorable District Court of the United States, Southern District of California, Central Division, the matter of George Earl Toolson vs. New York Yankees, Inc., et al., which said action is numbered 13070-BH in the files of said court; that the decision of the said Honorable District Court has been affirmed by the Honorable United States Court of Appeals for the Ninth Circuit in proceeding No. 13228, Per Curiam Opinion filed December 12, 1952; that affiant is informed and believes that the plaintiff and appellant in said action is preparing a petition for certiorari before the Honorable United States Supreme Court;

That the issues and principles of law determined in the matter of George Earl Toolson vs. New York Yankees, Inc., et al., are almost similar to those involved in the above-entitled action and that the defenses urged by the defendant New York Yankees, Inc., in the proceedings referred to have been urged by the defendants in this proceedings; that the decision of the United States Supreme Court in the matter of George Earl Toolson vs. New York Yankees, Inc., et al., will control the course of procedure and perhaps the decision in this presently-pending action.

/s/ JOHN F. O'DEA.

Subscribed and sworn to before me this 14th day of January, 1953.

[Seal] /s/ GLORIA M. HOWARD,
Notary Public, in and for the City and County of
San Francisco, State of California.

My commission expires June 17, 1956.

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

ORDER REMOVING CAUSE FROM
TRIAL CALENDAR

The parties hereto having so stipulated and good cause appearing therefor,

It Is Hereby Ordered that the above-entitled action may be removed from the pending trial calendar and may be reset for trial immediately following the disposition by the United States Supreme Court of the petition for certiorari in the matter of George Earl Toolson vs. New York Yankees, Inc., et al., which said matter involves issues of law raised herein.

Dated: January 20, 1953.

/s/ GEORGE B. HARRIS,
Judge of the Above-Entitled
Court.

[Endorsed]: Filed January 20, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL
OF COMPLAINT

To the Plaintiff above named and to Joseph L. Alioto, Esq., Joseph F. Murphy, Esq., and Elwood S. Kendrick, Esq., his attorneys:

You Will Please Take Notice that the defendants, National Football League, Chicago Cardinals Football Club, Inc., New York Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club on the 19th day of April, 1954, at the hour of 9:30 o'clock a.m., in the Department of the Honorable George B. Harris in the courtroom of the above-entitled court, Post Office Building, Seventh and Mission Streets, San Francisco, California, will move the said court for its order dismissing the complaint on file herein.

The said motion will be made pursuant to Rule 12(b) Federal Court Rules of Civil Procedure and will be based upon the following grounds:

- (1) That the complaint indicates a lack of jurisdiction in the court over the subject matter.
- (2) That the complaint fails to state a claim upon which relief can be granted.

Dated: April 9th, 1954.

/s/ MARSHALL E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 12, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL
OF COMPLAINT

To the Plaintiff above named and to Joseph L. Alioto, Esq., Joseph F. Murphy, Esq., and Elwood S. Kendrick, Esq., his attorneys:

You and Each of You Will Please Take Notice that the defendants Pacific Coast Football League and J. R. Klawans, on the 19th day of April, 1954, at the hour of 9:30 o'clock a.m., in the department of the Honorable George B. Harris, in the courtroom of the above-entitled Court, Post Office Building, Seventh and Mission Streets, San Francisco, California, will move the said Court for its order dismissing the complaint on file herein.

The said motion will be made pursuant to Rule 12(b) Federal Court Rules of Civil Procedure and will be based upon the following grounds:

- (1) That the complaint indicates a lack of jurisdiction in the Court over the subject matter.
- (2) That the complaint fails to state a claim upon which relief can be granted.

Dated: April 12th, 1954.

/s/ J. BRUCE FRATIS,
Attorney for Defendants Pacific Coast Football
League and J. R. Klawans.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1954.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 28988-R

WILLIAM RADOVICH,

Plaintiff,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

ORDER GRANTING MOTION TO DISMISS

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that defendants' motion to dismiss be, and the same hereby is, Granted.

Dated: April 30th, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge.

Toolson vs. New York Yankees,
346 U. S. 356;

Federal Baseball Club vs. National League,
259 U. S. 200.

[Endorsed]: Filed April 30, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that William Radovich, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the

Order granting defendants' motion to dismiss his complaint, entered in this action on April 30, 1954.

Dated: May 28, 1954.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint.

Interrogatories.

Answer to interrogatories.

Notice of objection of defendant, J. Rufus Klawans, to plaintiff's interrogatories and motion for an order for the protection of defendant and for an extension of time to answer certain interrogatories.

Interrogatories.

Interrogatories.

Motion to dismiss and motion to set for hearing.

Notice of motion of defendant, National Football League, to quash purported service of summons and to dismiss complaint.

Affidavit of Bert Bell in support of motions to dismiss.

Affidavit of J. Rufus Klawans in support of motions to dismiss.

Affidavit of Mary McCullough in support of motion of National Football League to dismiss.

Notice of motion of defendant, New York Football Giants Club, Inc., to dismiss complaint.

Affidavit of John V. Mara in support of motion of defendant, The New York Football Giants, Inc., to dismiss.

Notice of motion of defendant Chicago Cardinals Football Club, Inc., to dismiss complaint.

Affidavit of Ray Bennigsen.

Notice of motion of defendant Detroit Football Company to dismiss complaint.

Affidavit of Lewis Cromwell.

Notice of motion of defendant Chicago Bears Football Club, Inc., to dismiss complaint.

Affidavit of George S. Halas.

Affidavit of Daniel F. Reeves.

Notice of motion of defendant Los Angeles Rams Football Club to dismiss complaint.

Notice of objections of defendant, National Football League, to plaintiff's interrogatories and motion for an order for the protection of defendant and for an extension of time to answer certain interrogatories.

Notice of objections of defendant, Chicago Cardinals Football Club, Inc., etc., et al., to plaintiff's interrogatories, etc.

Answers to interrogatories by defendant National Football League.

Answers to interrogatories by defendant Los Angeles Rams Football Club.

Answers to interrogatories by defendant The New York Football Giants, Inc.

Answers to interrogatories by defendant Chicago Bears Football Club, Inc.

Answers to interrogatories by defendant Detroit Football Company.

Answers to interrogatories by defendant Chicago Cardinals Football Club, Inc.

Notice of motion of defendant The Philadelphia Eagles, Inc., to quash purported service of summons and to dismiss complaint.

Affidavit of Anthony J. Morabito in support of motion of defendant, The Philadelphia Eagles, Inc., to quash purported service of summons and to dismiss complaint.

Affidavit of Paul Lewis.

Order on motions to quash, etc.

Motion to strike portions of complaint by defendant National Football League.

Motion to strike portions of complaint by defendants, Chicago Cardinals Football Club, Inc., New York Football Giants, Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club.

Order denying motion to strike.

Answer of various defendants.

Answer of defendant J. Rufus Klawans.

Stipulation for removal of action from trial calendar.

Notice of motion for dismissal of complaint.

Notice of motion for dismissal of complaint.

Order granting motion to dismiss.

Notice of appeal.

Cost bond on appeal.

Appellant's designation of record.

Deposition of George S. Halas.

Deposition of William Radovich.

Deposition of George Preston Marshall.

Notice of motion to continue trial.

Affidavit in support of motion for continuance of trial.

Order removing cause from trial calendar.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 16th day of June 1954.

C. W. CALBREATH,

Clerk;

By /s/ WM. C. ROBB,

Deputy.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 28988

WILLIAM RADOVICH,

Plaintiff,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

JUDGMENT

Defendants, Pacific Coast Football League, J. Rufus Klawans, National Football League, Chicago Cardinals Football Club, Inc., New York Football Giant Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club, having moved for a dismissal of this cause under Rule 12(b) on the grounds that the complaint indicates a lack of jurisdiction in the court over the subject matter; and that the complaint fails to state a claim upon which relief can be granted; and said motion having been duly argued by counsel, both orally and upon written memoranda, and the court having granted defendants' motion to dismiss:

It Is Therefore Ordered and Adjudged that plaintiff's action be and it hereby is dismissed.

Dated: Sept. 17, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge.

Approved as to form as provided in Rule 5(d) of the Rules of Practice of the District Court of the United States for the Northern District of California.

/s/ J. BRUCE FRATIS,
Attorney for Pacific Coast Football League and J.
Rufus Klawans.

/s/ MARSHALL E. LEAHY,
Attorney for Other
Defendants.

JOSEPH L. ALIOTO,
MAXWELL KEITH,
ELWOOD S. KENDRICK,

By /s/ MAXWELL KEITH,
Attorneys for Plaintiff.

[Endorsed]: Filed September 17, 1954.

[Endorsed]: No. 14394. United States Court of Appeals for the Ninth Circuit. William Radovich, Appellant, vs. National Football League, et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 16, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that William Radovich, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment of Dismissal, entered in this action on September 20, 1954.

Dated: September 20, 1954.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 20, 1954.

United States Court of Appeals
for the Ninth Circuit
No. 14,394

WILLIAM RADOVICH,

Appellant,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellees.

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

To: The Honorable Chief Justice and Associate Justices of the United States Court of Appeals for the Ninth Circuit.

Appellant respectfully states that the following are the points upon which he intends to rely on appeal:

1. The trial court erred in dismissing plaintiff's complaint on the ground that organized professional football is not within the scope of the federal anti-trust laws.

2. The trial court erred in not ruling that plaintiff's complaint stated a good and sufficient action for injuries resulting from violations of recognized common law restraints of trade regardless of the application of the federal antitrust statutes to organized professional football.

Appellants designate the following documents and points of the record which they think necessary for the consideration of the foregoing points on appeal, to wit:

/s/ MAXWELL KEITH,
Attorney for the Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 17, 1954.

No. 14,394

United States Court of Appeals
For the Ninth Circuit

WILLIAM RADOVICH,

VS.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellant,

Appellees.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANT.

MAXWELL KEITH,

111 Sutter Street, San Francisco 4, California,

Attorney for Appellant.

FILED

DEC 23 1954

PAUL P. O'BRIEN,

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No. 14,394

United States Court of Appeals For the Ninth Circuit

WILLIAM RADOVICH,

Appellant,

VS.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellees.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

The complaint was filed and the proceedings were instituted against the National Football League, its various member clubs, various members' clubs of the Pacific Coast League, the Commissioner of the National Football League, Bert Bell, and the Commissioner of the Pacific Coast League, J. Rufus Klawans, under the Federal antitrust laws, specifically Title 15, U.S.C.A., Sections 15 and 26, commonly known as the Sherman and Clayton Acts, which vests in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws.

The plaintiff-appellant appeals from a judgment of dismissal of his complaint under Rule 12(b). (Tr. 69.)

STATEMENT OF THE CASE.

Appellant claims violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A., and seeks to recover threefold damages and injunctive relief. These statutory provisions are printed in the appendix.

Appellant in his complaint alleges in essence that a boycott between the National Football League and the Pacific Coast League, prevented him from obtaining a job as a player-coach from Mr. William Howard, coach of the San Francisco Clippers, which club was under the jurisdiction of the Pacific Coast League. (Tr. 14-15, 5, 28.)

The complaint alleges that appellant, William Radovich, was an exceptional football player (Tr. 4); that from 1938 to 1941 he played exceptional football for the Detroit Lions (Tr. 11); that after the war, and service with the Navy, he returned to the Lions for the 1945 season where he was chosen "All Pro Guard." At the end of the 1945 season, the complaint alleges, Mr. Radovich was offered a job with the Los Angeles Dons of the All-America Conference (Tr. 13, 14); that before signing for playing in this league, he asked Mr. Mandel, the President of the Detroit Lions, that he be allowed to play for the Los Angeles Rams in view of the fact that his

father had been stricken with a dangerous affliction in Los Angeles but that Mr. Mandel refused, and that thereafter Mr. Radovich played football for the Los Angeles Dons of the All-America Conference (Tr. 12-13). The complaint alleges that at the start of the 1948 season Mr. Radovich was offered a player-coach job with the San Francisco Clippers of the Pacific Coast League, alleged an affiliate of the National League (Tr. 5), but that this job was denied him by the active intervention of the National Football League which issued a blacklist to Mr. J. Rufus Klawans, under whose jurisdiction the Clippers operated. (Tr. 14-15.) Mr. Radovich, the complaint continues, has been prevented from playing football or becoming a coach at any time for any team under the jurisdiction of the National Football League. (Tr. 15.)

When first employed by the Detroit Lions, Mr. Radovich, the complaint alleges, was forced to sign a contract containing a reserve clause to the effect that appellant could not sign a contract with or play for any club other than the Detroit Lions, or its assignee, until and unless the employer consented. (Tr. 10, 11-12.)

The allegations of the complaint with reference to interstate commerce appear at Tr. 7-9, Tr. 14.

The answers of defendants admit the operations of the reserve clause (Tr. 30, 54), but deny having blacklisted plaintiff (Tr. 35, 56). The answer of defendant National Football League, in addition, raised the issue of whether or not plaintiff had reasonable

recourse within the rules of the National League to have settled his dispute. (Tr. 49.)

Both answers deny that professional football is in interstate commerce. (Tr. 24-28; Tr. 53.) Both answers deny the Pacific Coast League was an affiliate of the National Football League. (Tr. 38, 51.)

The complaint was filed on July 5, 1949. The action was removed from the trial calendar pending the decision in the case of *Toolson v. New York Yankees, Inc.*, 346 U.S. 356. (Tr. 61.) This was pursuant to stipulation that the action would be taken off calendar pending the *Toolson* decision. (Tr. 59.)

After the Supreme Court's decision in the *Toolson* case, defendants moved for a dismissal of plaintiff's complaint under Rule 12(b) for the reasons that the complaint indicated a lack of jurisdiction in the District Court and that it failed to state a cause of action. (Tr. 62, 63.)

After argument, the Court ordered dismissal, citing the cases of *Toolson v. New York Yankees* and *Federal Baseball Club v. National League*. (Tr. 64.) Judgment was entered dismissing the complaint (Tr. 69) without any consideration of factual issues.

SPECIFICATION OF ERRORS.

1. The District Court erred in dismissing plaintiff's complaint.
-

ARGUMENT.

- I. THE JURISDICTION OF THE DISTRICT COURT MAY BE FOUND IN ALL OR ANY ONE OF THE ALLEGATIONS OF THE COMPLAINT: (1) PLAINTIFF IS ENGAGED IN AN INTERSTATE TRADE; (2) DEFENDANTS ARE ENGAGED IN INTERSTATE TRADE OR COMMERCE OR THEIR ACTIVITIES AFFECT INTERSTATE TRADE OR COMMERCE; (3) DEFENDANTS PLANNED AN INTERSTATE BOYCOTT OF FOOTBALL PLAYERS WHO PLAYED FOR THE ALL-AMERICA CONFERENCE IN VIOLATION OF THEIR RESERVE CLAUSES.
- A. CONGRESS HAS AT ALL TIMES INTENDED TO GIVE RECOURSE TO THOSE INJURED BY CONTRACTS AND COMBINATIONS KNOWN AT COMMON LAW AND JURISDICTION IS BASED ON THE FACT THAT THE PLAINTIFF IS ENGAGED IN AN INTERSTATE TRADE.
1. The right to engage in an interstate trade or occupation is a common law right protected by the enactment of the Sherman Act.

Congress, when it passed the Sherman Act, intended to enact the English common law respecting restraints of trade. As was stated by Senator Hoar in the debates concerning the antitrust laws, 21 Congressional Record 3152:

“The great thing this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.”

See especially Chief Justice White's opinion in *United States v. Standard Oil Co.*, 221 U.S. 1, 50-60, and the discussion thereof in *United States v. American*

Medical Association (Ct. of Appeals, D. C., 1940), 110 F. 2d 703.

It was an early common law principle that men engaged in the creative occupations should be free to pursue their callings, and that voluntary contracts which unreasonably restricted this right were in restraint of trade. The *Dyer's Case*, 2 Hen. V pl. 26 (1415) (Dyer not to pursue his trade in a town for six months); *Anonymous*, Moore 115 (K.B. 1578) (an apprentice agreed not to exercise his craft at Nottingham for four years); the *Blacksmith's Case*, 2 Leon 210, Moore 242 (Common Pleas, 1587) (an agreement between two blacksmiths of the same town by which one covenanted not to exercise his trade within the town); *Colgate v. Bachelor*, Cro. Eliz. 872 (K.B. 1601) (a haberdasher bound himself not to follow his calling within the County of Kent within the cities of Canterbury and Rochester for four years). The restrictive covenants in these cases were held void.

Atlantic Cleaners and Dyers v. United States, 286 U.S. 427 (1932), in interpreting Section 3 of the Sherman Act, states, at page 436:

“Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.”

“Trade”, then, is within the scope of the antitrust laws. See *American Medical Ass'n v. United States* (1942), 130 F. 2d 233.

Accordingly, it would seem obvious that Congress has at all times intended to make the imposition of unreasonable restraints on the right to engage in interstate occupations within the Sherman Act.

2. Congress has power under the commerce clause to keep the channels of interstate commerce free as to persons and rights as well as commodities and exercised such power when it enacted the Sherman Act.

The allegations of the complaint would enable plaintiff to demonstrate that when a contract was signed with the Detroit Lions it contemplated the necessity of Mr. Radovich playing exhibition and regular season games throughout the United States in major metropolitan areas. In short, Mr. Radovich is engaged in an interstate occupation. Congress has power under the *commerce clause* to keep interstate channels free to such persons. *Edwards v. California*, 314 U. S. 160; 10 *Cal. Jur.* 2d 621, Sec. 2. Congress intended to exercise its full power under the commerce clause when it enacted the Sherman Act. *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, 435; *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553.

It is submitted that the Supreme Court in its carefully worded and carefully analyzed decision in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, revitalized the intention of Congress when it first passed the antitrust laws to make the Sherman Act an Act of protection of primary rights as well as an Act of defining duties whose breach alone could create a correlative right.

The Act was originally created to afford protection to the farmer and the artisan. 21 *Cong. Record* 3148, 3150.

The Supreme Court, in the *Mandeville Farms* case, stated, at 334 U.S. 236:

“The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 112, 90 L.Ed. 1575. The act is comprehensive in its terms and coverage protecting all who are made victims of the forbidden practices by whom-ever they may be perpetrated. Cf. *United States v. South-Eastern Underwriters Ass’n*, *supra*, at page 553 of 322 U.S., page 1173 of 64 S.Ct., 88 L.Ed 1440.”

It has been long settled that the defendants do not have to be engaged in interstate commerce to give federal jurisdiction. *United States v. National Football League* (D.C., Pa., 1953), 116 F.S. 319; *United States v. Patten*, 226 U.S. 525, 541.

The Sherman Act affords federal jurisdiction either when interstate commerce is affected or when there is a hindrance or defeat of congressional policy regarding it. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 232.

Since the commerce powers can be exercised to protect persons from burdens created by the state, *ipso*

facto it can be exercised to protect persons from boycotts by private parties which similarly place burdens on the right to practice a calling. The Sherman Act exercised such power. Op. cit.

B. DEFENDANTS ARE ENGAGED IN ACTIVITIES EITHER IN OR WHICH AFFECT INTERSTATE COMMERCE.

1. Intrastate activity is no longer separable from its interstate effect.

The holding of the case of *Federal Baseball Club v. National League, et al.*, 250 U.S. 200, that the local activity of the playing of baseball could be insulated from the effect that said playing has on interstate commerce has been overruled. It is a statement of the no longer controlling principle that manufacturing and production are separable from their interstate effect.

Not only has the law announced by the *Federal Baseball* case been changed, but so has the factual setting then present before the Supreme Court. At the time of the decision in 1922 league members were not engaged in commercial bargaining for interstate television and broadcasting profits. Even though the games may have been telegraphed, said telegraphing was not subject to interstate agreements (*U.S. v. National Football League*, supra) and did not affect admission prices.

If not overruled in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, supra, the *Federal Baseball* case would seem to have met its demise with the statement of the Supreme Court in *United States*

v. Employing Plasterer's Ass'n (1954) 1954 Trade Cases, 67,692; that

“Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases.”

2. **Whether or not the activities of defendants affect interstate commerce is a question of fact which no longer is subject to a motion to dismiss.**

Under the allegations of plaintiff's complaint, he may show the following: (1) The purchase and sale of franchise rights to professional teams are expensive and involve interstate means and methods. *United States v. South-Eastern Underwriters Ass'n*, *supra*; (2) Franchise holders from various states in the United States meet in a central location, pool their combined capital involving millions of dollars and decide which college football players from throughout the United States each can contract with; (3) The individual franchise holder, by agreement with franchise holders located in the various states, are able to negotiate and bargain for the services of said football players free of the competition of the others; (4) Said players are given transportation expenses to travel either to the place of business of the franchise holders' club or to farm areas; (5) That franchise holders or their representatives negotiate and bargain with corporations engaged in interstate business to televise or broadcast the playing of the game; (6) That said franchise holders or representatives cannot agree to contract for such televising or broadcasting without the approval of the Commissioner of Football

appointed by the vote of the various franchise holders in the several states; (7) That the earnings made by the various franchise holders from television and broadcast sales are substantial when compared to attendance receipts; (8) That the individual franchise holder bargains for the televising or broadcasting of his team's games free of the competitive bidding of other franchise holders; (9) That the effect of such noncompetitive negotiations allow only large and dominant interstate corporations to use this medium for advertising, and that small and local companies cannot afford to obtain rights to televising or broadcasting National League football games; (10) That the individual franchise holders agree when and under what conditions the television and broadcasting of the game is available to potential purchasers; (11) That football games are in fact televised and broadcast throughout the United States in which spectators are not confined to the actual place of the game but can see the game throughout the United States; (12) That admission prices for entrance to the football stadium are fixed by agreement of interstate franchise holders and set with regard to restrictions on the interstate televising and broadcasting of the game; (13) That such admission prices, made free of the competition of television and broadcasting, by an agreement of the various franchise holders located in the several states are, in fact, beyond the reach of the small wage earner; and finally (14) That the interstate transportation of the football players constitutes a substantial portion of their time when contrasted to the actual playing of the game.

The factual presentation of these matters would certainly show an effect on interstate commerce which cannot be decided on a motion to dismiss under rule 12(b) of the Federal Rules of Civil Procedure. *Las Vegas Merchant and Plumbers Ass'n v. United States* (9th Cir., 1954) 1954 Trade Cases, 67,673. *United States v. Employing Plasterers' Ass'n*, supra, where the Supreme Court stated at 69,231:

“And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.”

C. EVEN ASSUMING ARGUENDO THAT THE SHERMAN ACT DOES NOT PROTECT APPELLANT'S PRIMARY RIGHTS TO ENGAGE IN INTERSTATE TRADE, AND EVEN ASSUMING THAT DEFENDANTS ARE NOT ENGAGED IN ACTIVITIES WHICH MAY BE SHOWN TO AFFECT INTERSTATE COMMERCE, JURISDICTION MAY STILL BE BASED ON THE ALLEGATIONS IN THE COMPLAINT THAT DEFENDANTS WERE ENGAGED IN A NATION-WIDE CONSPIRACY TO BOYCOTT FOOTBALL PLAYERS WHO PLAYED FOR THE ALL-AMERICA CONFERENCE.

1. Even if defendants are not engaged in interstate commerce, the Sherman Act affords jurisdiction over conspiracies which intend to affect interstate commerce regardless of whether or not there is an effect on interstate commerce or over combinations or conspiracies which use interstate operations to carry out its objectives.

The allegations of the complaint set forth a bona fide contention that an interstate boycott existed, made possible by the agreement of franchise holders located in the several states so that football players could not play football or coach football for any team under the jurisdiction of the National League or willing to agree with its dictates if they played for the All-America Conference in violation of the reserve clause.

The complaint, then, further would fall within the rule that even if the defendants are not engaged in interstate commerce, they intended to affect it, or, further, used interstate means to carry out the alleged conspiratorial objects. *United States v. Columbia Steel Co.*, 334 U.S. 495, 522, 525; *Binderup v. Pathe Exchange*, 263 U.S. 291; *United States v. Frankfort Distilleries*, 324 U.S. 293; *Goldman Theatres v. Loew's Inc.*, 150 F. 2d 783; *United States v. Addyston Pipe and Steel Corp.* (6th Cir., 1898) 85 Fed. 271; *Ring v. Spina*, 148 F. 2d 647; *Ramsey v. Associated Bill Posters*, 260 U.S. 501; *Moore v. Mead's Fine Bread Co.* (U.S. Supreme Ct., 1954) 1954 Trade Cases, 67,906 and cases cited therein at 69,954.

The actual effectuation of the alleged boycott to deprive the appellant of his livelihood was made possible by the circulation of a blacklist by Mr. Bell in Philadelphia in the interstate mails which was received by Mr. Klawans in San Francisco. (Tr. 15.)

Since the All-America Conference is now defunct, appellant is completely barred from contact with professional football in the United States as a result of an alleged continuing boycott.

Appellee National Football League's answer seems to find comfort in the fact that appellant had grown old by 1947. (Tr. 42-43.) But the complaint alleges an interference with appellant's coaching career which was thwarted by appellees. (Tr. 15.)

- II. WHETHER DEFENDANTS ARE WITHIN THE SCOPE OF THE SHERMAN ACT IS A DE NOVO PROBLEM UNAFFECTED BY THE TOOLSON CASE.
- A. THE TOOLSON CASE DID NOT DECIDE THAT ORGANIZED PROFESSIONAL "SPORTS" WERE GIVEN EXEMPTION BUT ONLY THAT BASEBALL WAS GRANTED AN IMPLIED LEGISLATIVE EXEMPTION FROM THE ANTITRUST LAWS.

It must be presumed that Congress in enacting antitrust laws intended to cover all forms of activities within the scope of its powers. *United States v. Atlantic Cleaners and Dyers, Inc.*, 286 U.S. 427; *United States v. South-Eastern Underwriters' Ass'n*, 322 U.S. 533. The *Toolson* decision, 346 U.S. 356, carefully limited itself to the issue of whether baseball, in particular, as contrasted to professional "sports" in general, was granted a legislative exemption from the Sherman Act. The case merely held that "without examining the underlying issues" the "business of baseball has been left for thirty years to develop on the understanding that it was not subject to existing antitrust legislation." The Supreme Court felt that as to baseball, in particular, vested rights had settled which only Congress could upset.

Such is not the case with professional football. Appellees here adopted an interstate boycott as a means of dealing with appellant at their own peril.

The doctrine of *stare decisis* only involves the set of facts on which the judicial mind centers its attention. *United States v. Dunbar* (9th Cir., 1942) 154 F. 2d 889. The only examination of facts indulged in by the Supreme Court in the *Toolson* case was whether or not baseball had received an implied Congressional

exemption as a result of a prior decision of the Supreme Court. The Supreme Court never once mentioned the word "sport" but intentionally used the words "business of baseball" throughout the reported decision.

There is nothing compelling in the *Toolson* decision which prevents an independent decision from being made by this Court as to whether or not the complaint filed by appellant is within the jurisdiction of the Federal Courts for the reasons outlined herein.

Dated, San Francisco, California,

December 17, 1954.

Respectfully submitted,

MAXWELL KEITH,

Attorney for Appellant.

(Appendix Follows.)



Appendix.



Appendix

Section 1, Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; 15 U.S. Code, Sec. 1.

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *

Section 2, Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; 15 U.S. Code, Sec. 2.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4, Clayton Act

Oct. 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 26.

Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in

which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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AND PACIFIC COAST FOOTBALL LEAGUE.

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J. Rufus Klawans.

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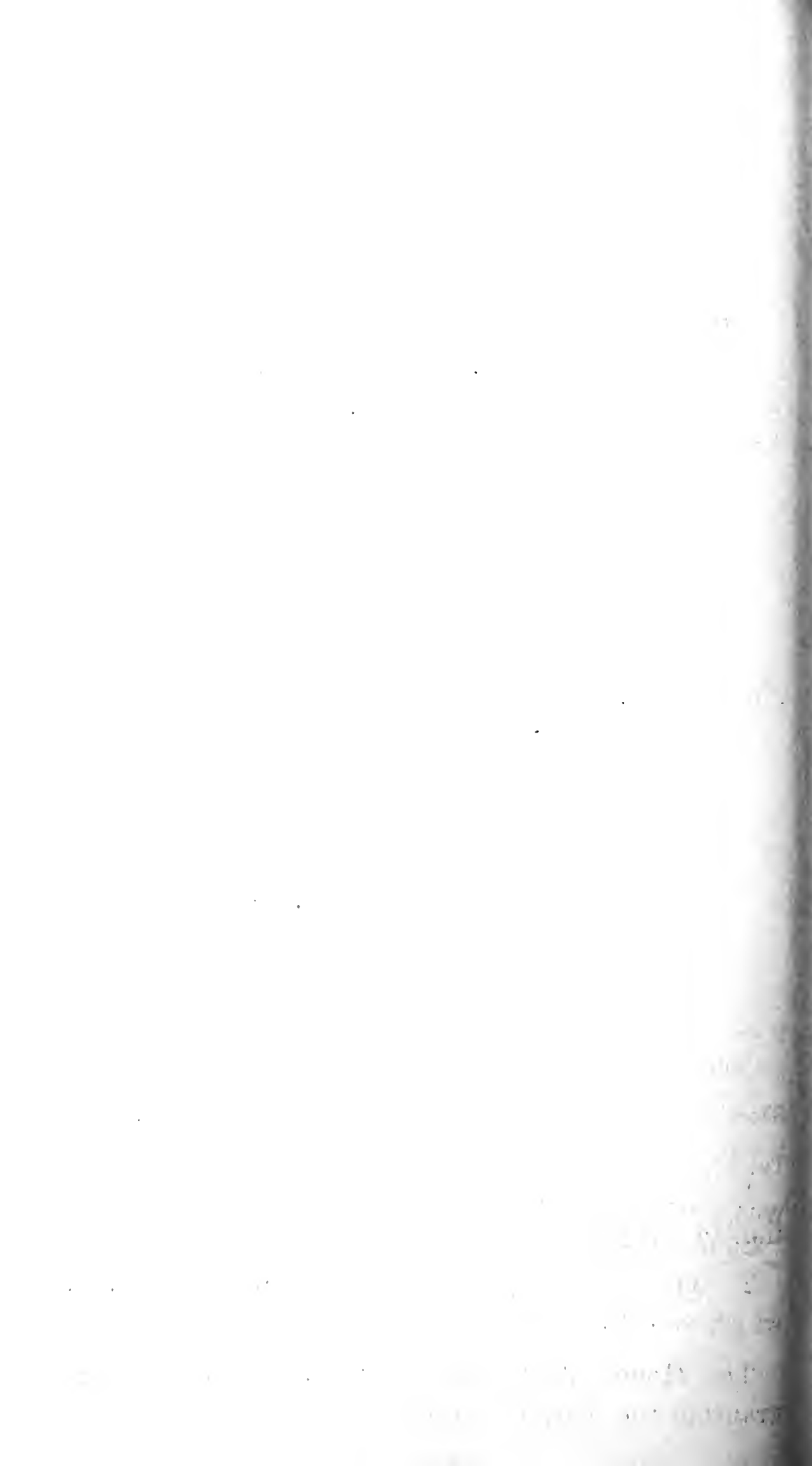


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PRELIMINARY STATEMENT.

The action was commenced by William Radovich in the District Court of the United States for the Northern District of California, Southern Division, claiming treble damages under the provisions of the Sherman Act. Motion to dismiss the complaint was made upon the grounds:

1. That the complaint indicates a lack of jurisdiction in the Court over the subject matter.
2. That the complaint fails to state a claim upon which relief can be granted.

The Honorable George B. Harris made an order granting the motion to dismiss.

The conspiracy charged in plaintiff's complaint involved the National Football League and some of its member teams, as well as these appellees, the Pacific Coast Football League and J. Rufus Klawans.

The basic issues involved in this appeal are substantially the same as to all appellees. A brief has already been filed by appellees National Football League, Chicago Cardinals Football Club, Inc., New York Football Giants Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club.

In the interest of brevity, these appellees hereby adopt the legal arguments contained in the brief of the foregoing appellees, rather than again setting them forth in this brief.

However, as the appellee J. Rufus Klawans was the Commissioner of the Pacific Coast Football League and never associated in any way with the appellee National Football League, nor with any of its member teams, these appellees submit the following legal arguments in addition to those adopted from the briefs of the other appellees.

THE CONTENTIONS OF THESE APPELLEES.

The order of the District Court dismissing plaintiff's complaint was proper because

(a) The complaint failed to allege a cause of action under the provisions of the Sherman Act because it did not contain facts showing an un-

reasonable restraint of interstate activities constituting trade or commerce within the meaning of the Act.

(b) Even if it be assumed that such an unreasonable restraint was shown in the complaint, it failed to allege a cause of action under the provisions of the Sherman Act because it did not allege facts showing that a substantial detriment to the public resulted therefrom.

(c) The complaint failed to allege facts showing that the acts of the appellees alleged to be in violation of the Sherman Act caused or resulted in the damage claimed by plaintiff.

ARGUMENT.

1. PROFESSIONAL FOOTBALL IS NOT TRADE OR COMMERCE WITHIN THE MEANING OF THE SHERMAN ACT.

Although the common law had some influence in the enactment of the Sherman Act, the question of whether the acts complained of are within the scope of the Act is a matter of purely statutory construction.

Shotkin v. General Electric Co., 171 Fed. (2d) 236.

The Sherman Act is limited to combinations, agreements or concerts which tend to prejudice the public interest by unduly restricting competition or unduly obstructing the due course of trade, or which because

of their evident purpose or inherent nature injuriously restrain trade in competitive markets.

Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165, 59 L.Ed. 520.

Not all restraints of trade are penalized under the Sherman Act; an injury to plaintiff alone is not sufficient; public interest must be injuriously affected to an appreciable degree.

Shotkin v. General Electric Co., supra.

The business of giving exhibitions of baseball are purely state affairs.

Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200;

Toolson v. New York Yankees, 346 U.S. 356.

The pattern of giving exhibitions of professional football is identical with that of professional baseball. Accordingly, the rulings in the "Federal" case and "Toolson" case, above cited, are clearly applicable to the "sport" here involved, to-wit: the business of giving exhibitions of professional football.

2. PLAINTIFF'S COMPLAINT FAILS TO SHOW ANY SUBSTANTIAL DETRIMENT TO THE PUBLIC.

The many cases cited in the brief filed by the other appellees herein clearly establish that injury to a plaintiff alone is not sufficient; there is no remedy under the Sherman Act unless the alleged restraint does appreciable harm to the general public in the form of undue restriction of trade or commerce.

Here the plaintiff seeks only to show that the acts of the appellees barred him from playing professional football in the particular leagues involved in the alleged conspiracy.

This is neither an allegation that interstate commerce has been affected, nor that the general public has been injuriously affected to any extent, much less a substantial degree.

As pointed out in the brief of the other appellees, plaintiff was not even employed in an industry which was unquestionably engaged in interstate commerce.

Under such circumstances, plaintiff's complaint fails to allege facts supporting this basic essential to a cause of action.

3. THE ALLEGED WRONGFUL ACTS OF APPELLEES DID NOT CAUSE THE DAMAGE OF WHICH PLAINTIFF COMPLAINS.

The complaint of appellant does not allege any restriction or restraint of competition, except as to the particular leagues and teams involved. While the acts complained of might have had a restriction upon plaintiff's right to play professional football to this limited extent, there is nothing in plaintiff's complaint to show that there was any impact on professional football or any lessening of competition in this field. Nothing in the complaint indicates that he was not free to offer his services to the many teams and leagues available.

The substance of his complaint is that he was precluded from employment by a small segment of teams

engaging in the business of giving football exhibitions, after he had breached a contract with a member team of appellee National Football League. He now claims that this injuriously affected the public to an appreciable degree and created a restraint of trade in interstate commerce within the purview of the Sherman Act.

The mere statement of the proposition contains its own answer.

CONCLUSION.

For the many reasons aforesaid, and under the legal authorities herein stated and set forth in the brief of the other appellees, it is respectfully submitted that the order of the Honorable District Court dismissing plaintiff's complaint should be affirmed.

Dated, San Francisco, California,
February 23, 1955.

J. BRUCE FRATIS,
*Attorney for Appellees
Pacific Coast Football League
and J. Rufus Klawans.*

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BEARS FOOTBALL CLUB, INC., DETROIT
FOOTBALL COMPANY AND LOS AN-
GELES RAMS FOOTBALL CLUB.

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The action was commenced by William Radovich in the District Court of the United States for the Northern District of California, Southern Division, claiming treble damages under the provisions of the Sherman Act. Motion to dismiss the complaint was made upon the grounds:

(1) That the complaint indicates a lack of jurisdiction in the Court over the subject matter.

(2) That the complaint fails to state a claim upon which relief can be granted.

The Honorable George B. Harris made an order granting the motion to dismiss.

SUMMARY OF ARGUMENT OF APPELLEES.

The order of the Honorable District Court was a proper one for each of the following assigned reasons:

(1) The complaint fails to allege the basic and elemental facts which the decisions hold to be requisite to the statement of a cause of action under the provisions of the Sherman Act, i.e.

- (a) An unreasonable restraint or monopoly, of
- (b) interstate or international activities
- (c) which constitute trade or commerce within the meaning of the act
- (d) a substantial detriment to the public
- (e) special damage to the plaintiff in his business or property caused by the restraint upon interstate commerce.

(2) The complaint alleges facts indistinguishable from those presented in *Toolson v. New York Yankees*, 346 U.S. 356.

(3) The complaint does not allege that the appellees are engaged in any endeavor which can be

construed as "trade or commerce" within the intent of the antitrust laws.

(4) The allegations of the complaint relative to the interstate aspects of the exhibitions of professional football indicate such to be merely incidental to the principal activities of appellees.

(5) The complaint does not allege any substantial detriment or even any detriment suffered by the public from any of the alleged action of appellees and consequently the complaint fails to qualify as a proper claim for treble damages since the right of private action afforded by the Sherman Act was granted to encourage private citizens to assist in the elimination of practices which caused public harm.

(6) The complaint does not allege that the damage suffered by plaintiff was caused by the acts of appellees which are alleged as violations of the antitrust laws.

(7) The decisions of the United States Supreme Court in *Federal Baseball Club v. National League*, 259 U.S. 200 and *Toolson v. New York Yankees*, 346 U.S. 356 are predicated upon a pattern of operation involving the formation of leagues and the control of player talent through the instrumentalities of a uniform players contract and a reserve clause, and the doctrine of stare decisis requires the application of such decisions to the sport of football which the complaint alleges to be organized and operated upon identical lines.

The contentions of Appellees will be herein advanced as part of their reply to the arguments found in appellant's brief.

REPLY ARGUMENT.

The argument of appellant in his opening brief is divided into two main parts, the first relating to the general bases for jurisdiction in actions of this nature and the second considering the extent to which the doctrine of stare decisis would make applicable the decisions of the United States Supreme Court in *Toolson v. New York Yankees*, 346 U.S. 356 and *Federal Baseball Club v. National League*, 259 U.S. 200. The first part is subdivided in its consideration of various facets of the jurisdictional problem but advances substantially the same claims of jurisdiction which are presented in the various baseball cases. The second part proscribes the doctrine of stare decisis and would reduce its effect to that of the doctrine of res adjudicata.

The subdivisions of appellant's brief are not restricted to the treatment of particular phases of the subject and consequently a topical consideration of the argument is not permitted. For the convenience of the Court in correlating the reply with the argument, the brief of appellees will follow the numbering and lettering adopted by appellant.

Part I A 1

Appellant herein reminds the Court of the common law background of the legislation relating to restraints of trade. We do not interpret this portion of the brief as a claim for redress under rights existing at common law. Lest we misinterpret the argument however, may it be indicated that the complaint before us is one based solely upon a statutory right and remedy and that a Federal forum has been sought upon the allegation that the Sherman Act constitutes the basis for the action.

We too are not unmindful of the influence of the common law upon the development of this field of law. But at any attempt to ascribe only common law parentage to the body of anti-trust law we can only observe that it would take an extremely wise child to recognize such ancestry. Despite its promptings the law relating to restraints of trade has developed with limitations and extensions, refinements and distensions which take it beyond common law concepts to the degree that it is practically *sui generis*.

In *Shotkin v. General Electric Co.* 171 F. (2d) 236 (10th Circuit 1948) the court though recognizing the influence of the common law, promptly points out the tangent pursued by the Sherman Act to the extreme that only matters which affect public interest are of concern. At page 238 of such decision is stated:

“The general principles of the common law relating to contracts for the restriction or suppression of competition in the markets, agreements to fix prices, concerts to divide marketing

territories, understandings to apportion customers, meeting of minds to restrict production, unity of purpose to furnish inferior products, and other like practices which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the markets are familiar to all and therefore do not call for elaboration here. But the resulting restraints of trade were not penalized and they did not give rise to any actionable wrong. The Sherman Act, approved July 2, 1890, 26 Stat. 209, 15 U.S.C.A. §§1-7, 15 note, took its origin from that common-law background, and its primary purposes were more effective protection of the public from the evils of restraints on the competitive system. It extended the inhibition to any combination or conspiracy, whatever its form, having injurious effects of that kind upon the competitive system, and it provided both public and private remedies for the injuries flowing from the restraints. *United States v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271, 46 L.R.A. 122, affirmed 175 U.S. 211, 20 S.Ct. 96, 44 L. Ed. 136; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L. Ed. 619, 34 L.R.A., N.S., 834, Ann. Cas. 1912D, 734; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A.L.R. 1044.

Founded upon these broad concepts of public policy, the Act is limited in operative scope and effect to combinations, agreements, or concerts which tend to prejudice the public interest by unduly restricting competition or unduly obstruct-

ing the due course of trade, or which because of their evident purpose or inherent nature injuriously restrain trade in the competitive markets. *Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U.S. 165, 35 S.Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Ramsay Co. v. Associated Bill Posters of United States and Canada*, 260 U.S. 501, 43 S. Ct. 167, 67 L. Ed. 368; *United States v. American Linseed Oil Co.*, 262 U. S. 371, 43 S. Ct. 607, 67 L. Ed. 1035; *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed. 145

It is essential to recovery in an action of this kind that plaintiff allege and prove two things, a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert. *Wilder Manufacturing Co. v. Corn Products Refining Co.*, *supra*; *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 72 F. 2d 885. The injury to the public need not be nationwide in geographical scope. If it involves monopolistic effect upon interstate commerce, it is enough even though it be narrow in geographical extent. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996; *William Goldman Theatres, Inc. v. Loew's, Inc.*, 3 Cir., 150 F.2d 738, *Id.*, 3 Cir., 164 F.2d 1021,

certiorari denied, 334 U.S. 811, 68 S.Ct. 1016. But it must injuriously affect public interest, and the effect must be appreciable.”

The complaint of appellant here before us is a thin voice when tested by the standards of the *Shotkin* case.

By quotation from *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, appellant apparently attempts to establish that the word “trade” is comprehensive enough to include the playing of football. The case is not a very convincing support of such position. It involved injunctive proceedings instituted by the United States against price fixing activities of a group of firms carrying on the business of cleaning, dyeing and renovating wearing apparel at plants located in the District of Columbia. Defendants contended that they were not engaged in “trade or commerce” in that such expressions were equivalent to traffic in goods, or buying and selling in commerce or exchange. Justice Sutherland pointed out that trades are sometimes carried on without buying or selling goods, an obvious answer to a specious defense.

The *American Medical Association* case cited in appellant’s brief (130 F. (2d) 233) held that a Group Health Association functioning in the District of Columbia was engaged in trade or commerce. The Court observed:

“The common law recognizes the practice of medicine as a trade . . . Congress chose to take

over in the Sherman Act the common law concept of trade . . . ”

The most that these decisions tell us is that prior to the passage of the Sherman Act certain fields of endeavor had been classified as trades by the common law and that Congress at the time of the adoption of the Act was aware of such decisions and intended the words “trade or commerce” to be descriptive of those fields of endeavor. Conceding the fiction we can readily reply that the playing of football was unknown to the common law as a trade or otherwise. We can also rely upon the fact that the United States Supreme Court has held that the playing of baseball, an indistinguishable endeavor, was not intended by Congress to be embraced by the term “trade or commerce” as such term is employed in the Sherman Act. (*Federal Baseball Club v. National League*, 250 U.S. 200; *Toolson v. New York Yankees, Inc.*, 346 U.S. 356.)

Section I A 2 of appellant’s brief offers several thoughts relating to the scope of the Sherman Act. Decisions are cited in support of the statement that Congress intended to exercise its full power under the commerce clause when it enacted the Sherman Act. The implication must be that the interstate commerce clause of the Constitution is comprehensive enough to include the playing of football and the Sherman Act is co-extensive with such clause. The

position is unsound. While it is true that the Supreme Court has said in several cases that Congress exercised its full constitutional power in the enactment of the Sherman Act, the decisions are clear that the full exercise of that power was limited to preventing restraints on commercial competition in interstate trade or commerce.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 495;
United States v. Frankfort Distilleries, 324
 U.S. 293, 297-8.

In *Apex Hosiery Co. v. Leader* the Court held that although Congress had the power to bring the questioned conduct under the Sherman Act, it had not done so, the Court pointing out that the acts of the defendants did not involve any commercial competition which had always been held an essential element of a violation of the Sherman Act, and that it was only in the sense of preventing restraints on commercial competition that Congress exercised its full constitutional authority. The Court stated in part:

“Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory construction not constitutional power.”

“ * * * The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.”

“ * * * Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition that Congress exercised ‘all the power it possessed.’ *Atlantic Cleaners and Dyers v. United States*, supra, (286 U.S. 435.)”

Plainly the question of whether the alleged activities of appellees are within the orbit of the Sherman Act is also a matter of statutory construction and not of constitutional power. It may be assumed that Congress has the power to regulate a business utilizing interstate commerce and transportation even though it does not involve restraints upon commercial competition. The error of appellant is in assuming that because it has such power it exercised it in the Sherman Act with respect to the activities alleged in this complaint.

Appellant further argues that the playing of football is interstate commerce, that as a consequence Mr. Radovich is engaged in an interstate occupation and hence any activities of appellees which harmed Mr. Radovich in the matter of his employment would constitute a violation of the Sherman Act. The process of logic which arrives at such a non sequitur would bear tracing. In its first unwarranted step it assumes that the playing of football is commerce as the term is employed by the Act. Furthermore it evidences an inability to distinguish between the em-

ployment of Mr. Radovich and interstate commerce. The case for Mr. Radovich would be no more persuasive had he been employed in a field, the interstate character of which was unquestionable, and had the nature of his employment been such as to take it beyond the labor exemption of the anti-trust acts. If under such assumed circumstances an industry wide conspiracy had blacklisted Mr. Radovich from further employment he could find no redress under the Sherman Act unless he could show some substantial impact of the conspiracy upon interstate commerce, not merely upon the financial position of Mr. Radovich.

The facts as here assumed for sake of example are present in *Hunt v. Crumboch*, 143 F. 2d 902. The plaintiff, a trucker engaged in interstate hauling was driven out of business by concerted labor union activity designed to such end. In affirming the dismissal of the complaint the Court stated in part:

“Congress did not undertake by the enactment of the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public.

“ . . . We must assume, for nothing to the contrary appears in the plaintiff's case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work

formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public however, it is immaterial whether the plaintiffs or others provide the services.”

Even the *Mandeville Farms* case which seems to afford appellant such comfort points out the dual consequences which must flow from conduct to render it subject to the treble damage liability of the Sherman Act:

“It is rather whether the statute’s policy has been violated in a manner to produce the general consequences it forbids for the public *and* the special consequences for particular individuals essential to the recovery of treble damages. Both types of injury are present in this case, for in addition to the restraints put upon the public interest in the interstate sale of sugar, enhancing the refiner’s controls, there are special injuries affecting the petitioners resulting from those effects as well as from the immediate operation of the uniform price arrangement itself.”

The primary requisite of an injury to the public prior to any consideration of private injury is well established by the decisions. The private statutory right of action to recover treble damages caused by a violation of the Sherman Act was created to induce private persons to assist in the enforcement of the

Act. However, the private right of action is incidental and subordinate to the protection of the public. *Appalachian Coals, Inc. v. United States* (1933), 288 U.S. 344, 360; *Apex Hosiery Co. v. Leader* (1940), 310 U.S. 469, 500; *Shotkin v. General Electric Co.* (10th Cir., 1948), 171 F. 2d 236, 239; *Feddersen Motors v. Ward* (10th Cir., 1950), 180 F. 2d 510, 521-522; *Glenn Coal Co. v. Dickinson Fuel Co.* (4th Cir., 1934), 72 F. 2d 885, 889; *Abouaf v. J. D. & A. B. Spreckels Co.* (N.D. Cal., 1939), 26 F. Supp. 830, 832-833; *Myers v. Shell Oil Co.* (S.D. Cal. 1951), 96 F. Supp. 670, 674; *Citizens Publishing Co. v. Merchants & Mfr. Ass'n.* (D.D.C., 1949) 83 F. Supp. 994, 997.

The principle is well stated in *Shotkin v. General Electric Co.* (171 F. 2d 236, 239):

“ * * * Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. *There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert* * * * ”

In *Apex Hosiery Company v. Leader*, 310 U.S. 469, 500, the Supreme Court stated:

“ * * * Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, *for the public wrongs* which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition . . . ”

The complaint of appellant before us contains no allegations even remotely suggesting a public wrong or any impact upon commercial competition. There is no contention that the quality of football has been lessened or the prices of admissions increased by the refusal to employ appellant as a coach for a minor league team. No allegation is found as to a lessening of competition; on the contrary it appearing obvious that the player regulations complained of have as their purpose the preservation of balanced teams to insure competition. There is no claim that the team deprived of the services of Radovich found him irreplaceable. The complaint tells us merely that appellant was unable to obtain employment in a particular branch of endeavor.

To such complaint should be addressed the words of this Honorable Court in *Conference of Studio Unions v. Loews, Inc.* 193 F. 2d 51:

“ * * * A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the Anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed *which harms him*. He must show that he is *within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry*. Otherwise he is not injured ‘by reason’ of anything forbidden in the anti-trust laws.

Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and *withheld from those who seek the windfall of treble damages because of incidental harm.*”

By the citation of *United States v. National Football League*, 116 F.S. 319, appellant makes the obvious point that a person not himself engaged in interstate commerce may commit acts which affect interstate commerce. The Court in such proceeding was concerned only with the agreement among the member teams of the National Football League restricting broadcasting and telecasting. There could be no question but that radio and television were interstate commerce. The Court believed that the restrictive agreement imposed substantial restraints on the television and radio industry and assumed jurisdiction upon the ground that since the league agreement restricted substantially something which is in interstate commerce it is immaterial whether professional football by itself is commerce or interstate commerce.

Appellees do not contend that none of the activities of professional football is subject to federal regulation or that professional football or these appellees could not engage in activities which would constitute a violation of the Sherman Act. What we do contend is that none of the activities, by which appellant was allegedly damaged and which alone are before this

Court for consideration, either violates or comes within the scope of the Sherman Act.

In the consideration of the National Football League case there is found the word "substantial" as a qualifier to the expression "restriction upon interstate commerce." The same combination of words runs through all of the anti-trust decisions as a *leit motif*, imposing an essential condition upon the invocation of the treble damage provisions of the Sherman Act upon any course of conduct. To warrant the sanctions of the Act the complaint must allege not a mere impingement upon interstate commerce but that such conduct substantially affects interstate commerce. It is well established that in order to furnish a basis for an action under the Sherman Act, any restraint of interstate trade or commerce must be a substantial restraint. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U. S. 219, 234; *United Mine Workers of America v. Coronado Coal Co.* (1922), 259 U.S. 344, 410-411, 412; *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.* (1924), 265 U.S. 457; *Levering & Garrigues Co. v. Morrin* (1933), 289 U.S. 103; *Chicago Board of Trade v. United States* (1918), 246 U.S. 231, 238; *Apex Hosiery Co. v. Leader* (1940), 310 U.S. 469.

Although the complaint here alleges that the normal activities of appellees touch upon various facets of interstate commerce such as transportation, radio and television, it is not alleged, nor can it be alleged that the non-employment of appellant would have

any substantial or indeed any effect upon such instruments of interstate commerce.

I B 1. This subsection of appellant's brief "overrules" and then distinguishes the *Federal Baseball* case. It might have been read with concern prior to the *Toolson* case. It can now be considered only by ignoring the *Toolson* decision.

The *Mandeville Island Farm* case is advanced as contradictory of the opinion of the Supreme Court that the playing of baseball could be considered an intrastate act. Appellant reads the Federal Baseball Decision to a result that manufacturing and production are separable from their interstate effect. He finds in *Mandeville Island Farms* an opposite result. We find nothing inconsistent between the cases. The *Mandeville* case does not hold that the production of sugar beets, the sugar beets themselves, the local sale of sugar beets or even the refining of sugar from the sugar beets constituted interstate commerce but instead that the restraints imposed upon these local activities were intended to restrain, and did restrain, interstate commerce in sugar. In such case the end and objective of the defendants was the distribution and sale of sugar in interstate commerce. The defendants sought to avoid liability for their attempt to monopolize and control that commerce by a claim that their illegal agreements dealt only with the price paid for beets before their manufacture into

sugar. In the baseball cases and in the case at bar the end and object was the playing of a local game. Certainly interstate communication and travel are incidental to the playing of the games. But it is not contended that any actions by organized baseball or football in restraint of such interstate features caused any injury to complainants. The player regulations by which appellant alleges he was damaged were designed to affect and did affect only the playing of the local games. Appellant would concentrate attention upon these incidental activities which are in no manner affected by the player regulations and by which appellant was in no way damaged and would disregard the main and sole objective of appellees—a local activity to which alone the player regulations are designed to apply and do apply. The regulations were not designed to affect and did not have the slightest effect upon any of the incidental interstate activities of appellees or upon interstate communication or travel.

Appellant contends that the factual setting which existed at the time of the Federal Baseball decision has been changed by the commercial bargaining for interstate television and broadcasting profits. Today's factual setting, however, presents no change from that which existed in 1953 when the same arguments were rejected by the Supreme Court when advanced on behalf of George Toolson.

The citation of *United States v. Employing Plasterer's Ass'n* to indicate the difficulty in delineating in-

terstate and local commerce, neither disposes of the *Federal Baseball* case nor adds to this discussion.

The case, heard in conjunction with that of the Lathers Association (both reported at 347 U.S. 452) considered the effect of the activities of various unions in the Chicago area upon the interstate flow of building materials. The only point pertinent to the matter here on appeal is found in the dissenting opinion of Justice Minton, in which Justice Douglas concurs. Both the *Toolson* and the *Federal Baseball* cases are cited in support of the position that bringing laborers across state lines to work in Chicago does not constitute interstate commerce. The opinion indicates that the Supreme Court as recently as 1954 regarded the *Federal Baseball* case and the *Toolson* case as vital expressions of law.

I B 2. In the nature of an offer of proof appellant enumerates putative facts which he might have introduced within the framework of the complaint which was dismissed. His legal conclusion is that the matter was resolved to a question of fact and that the motion to dismiss was not properly entertained. The authority for the conclusion is a quotation from the Supreme Court in *U.S. v. Employing Plasterers' Assn.* (properly cited at 347 U.S. 452) as follows:

“And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.”

We have no quarrel with the quoted principle of law. We do insist however that a complaint to be sufficient must “*charge every element necessary to recover*” as such principle exacts.

In order to make a proper statement of claim for recovery of treble damages under 15 USC 15 for alleged violations of § 1 and § 2 of the Sherman Act, a complaint must allege facts which, if proved, would establish¹ an unreasonable restraint of, or a monopoly of, or an attempt to monopolize² interstate or international activities which³ constitute trade or commerce within the meaning of the Act,⁴ a sub-

¹*Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. American Tobacco Co.*, 221 U.S. 106, 180; *Board of Trade v. United States*, 246 U.S. 231, 238; *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 376-7; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 486-501; *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 597; *United States v. Columbia Steel Co.*, 334 U.S. 495, 521-2.

²⁻³*Apex Hosiery Co. v. Leader*, 310 U.S. 469; *Federal Baseball Club v. National League*, 259 U.S. 200, 208-9; *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-3; *Levering Co. v. Morrin*, 289 U.S. 103, 107; *National League v. Federal Baseball Club* (CCA, D. of C.), 269 Fed. 681, 684-5; *F & K Co. v. Special Site Sign Co.* (CCA 9), 85 F. (2d) 742, 750, cert. den. 299 U.S. 613; *McJunkin v. Richfield Oil Co.* (D.C. Cal.), 33 F. Supp. 466, 469.

⁴*Shotkin v. General Electric Co.* (C.C.A. 10), 171 F. (2d) 236, 238-9; *Feddersen Motors v. Ward* (C.C.A. 10), 180 F. (2d) 519, 521-2; *Citizens Pub. Co. v. Merchants & Manufacturers Assn.* (D.C.D. of C.), 83 Fed. Supp. 994, 997; *Riedley v. Hudson Motor Car Co.* (D.C. Ky.), 82 Fed. Supp. 8, 10; *Glenn Coal Co. v. Dickinson Fuel Co.* (C.C.A. 4), 72 F. (2d) 885; *Myers v. Shell Oil Co.*, (D.C. Cal.), 96 F. Supp. 670, 674; *Arthur v. Kraft-Phenix Cheese Corp.* (D.C. Md.), 26 F. Supp. 824; *Abouaf v. Spreckels Co.*, 26 F. Supp. 830, 832-3.

stantial detriment to the public and⁵ special damage to the plaintiff in his business or property proximately caused by the alleged restraint upon monopoly of or attempt to monopolize interstate commerce.

It is obvious from a consideration of the standards prescribed by the decisions for a proper statement of a cause of action in proceedings of this nature that the complaint of appellant fails to state a claim upon which relief can be granted and indicates a lack of jurisdiction in the Court over the subject matter. In testing the sufficiency of the complaint by the standards so established it is not incumbent upon us to consider the putative facts that appellant has "shouted into the record" by the offer of proof found in his brief. While we are certain that the Court does not expect such free assertions to be even freely denied we cannot resist the aside that many of the assertions appearing in this section of the brief are founded in fantasy. Nothing could be farther from fact than the claim that admission prices to games are fixed by agreement of interstate franchise holders. There is no parity whatever in admission prices throughout the league. The statement that admission prices have been established beyond the reach of the small wage earner is preposterous. Prices of admission to pro-

⁵*Glenn Coal Co. v. Dickinson Fuel Co.* (C.C.A. 4), 72 F. (2d) 885, 887; *Gerli v. Silk Ass'n* (S.D. N.Y.), 36 F. (2d) 959, 960; *Westmoreland Asbestos Co. v. Johns-Manville Co.* (S.D.N.Y.), 30 F. Supp. 389, 391, aff'd 113 F. (2d) 114; *Beegle v. Thomson* (C.C.A. 7), 138 F. (2d) 875, 881, cert. den. 322 U.S. 742; *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, 153; *Revere Camera Co. v. Eastman Kodak Co.* (D.C. Ill.), 81 F. Supp. 325, 331; *Wesstor Theatres v. Warner Bros. Pictures* (D.C.N.J.), 41 F. Supp. 757, 763; *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8.

fessional football games are far below those for collegiate competition.

The complaint which appellant would justify invites the inquiry of the Court into a field which the Supreme Court holds not to be commerce and whose activities have been decreed to be local and not interstate. It alleges no detriment whatever to the public, much less the substantial detriment essential to jurisdiction. It indicates no causal connection between the alleged restraint upon interstate commerce and the alleged injury sustained by appellant.

We can concede that the question of the reasonableness of any restraint is one of fact in the ultimate analysis. But the reasonableness of the restraint is only one of the five elements which must appear from the complaint to render it sufficient. The bases of jurisdiction must be present before such issue of fact can be tried. The process of the Court of Appeals for the 10th Circuit in analyzing the complaint in *Feddersen Motors Inc. v. Ward*, 180 F. 2d, 519, 522 would seem most apposite:

“With these general principles in mind, we come to the crucial question whether the complaint stated a cause of action cognizable under the Act. The pleading did not allege facts constituting the constituent elements of the familiar pattern of combination or conspiracy among competitors in the field of industry or commerce to fix prices, divide marketing territories, apportion customers, restrict production, or otherwise suppress competition. It alleged that the defendants formed a combination or conspiracy in restraint

of interstate commerce. It further alleged that they combined and conspired to force plaintiff out of business as a dealer in Hudson automobiles. It further alleged that defendants had discriminated against plaintiff in certain respects. And it further alleged that the effect of the unlawful acts and practices on the part of defendants was to burden, obstruct, and unduly restrain interstate commerce and trade in new Hudson automobiles. But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendants violated the act with harmful results to the public. No facts were alleged from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the conspiracy was that fewer automobiles moved in interstate commerce from Detroit, Michigan, into Colorado, or other destination; or that less Hudson automobiles were available for purchase in the markets, either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. The pleading was completely barren of any allegations from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in interstate commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which

it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest. Failing to contain allegations of that requisite nature, the pleading was insufficient in law to state a cause of action for which relief could be granted under the Act. *Shotkin v. General Electric Co.*, supra.”

Dissection of appellant's complaint, in the foregoing manner would prove fatal even in the absence of the *Federal Baseball* and *Toolson* decisions.

I C 1. Appellant again submits the argument that one need not himself be engaged in interstate commerce to subject himself to the sanctions of the Sherman Act if he be guilty of conduct which does restrain interstate commerce. Appellees again concede that such is the law with the qualification that the effect upon interstate commerce must be substantial.

However, the gap which appellant fails to perceive or attempt to bridge is the *sine qua non* of interstate commerce. Neither the complaint nor the brief indicate that any phase of interstate commerce has been affected by the alleged boycott of the appellees. It is stated that the boycott was effectuated by the circulation of a black-list through interstate mails. Certainly no implication is intended that the circulation had any effect upon interstate mails. The ultimate effect of the boycott is alleged as the barring of appellant from professional football in the United States. If

such be true, sad though it may be, it is not tantamount to an allegation that interstate commerce has been affected. We have herein before substantiated with authorities the reply that even had appellant been employed in an industry which was unquestionably engaged in interstate commerce, a boycott effected against him would not be a restraint upon interstate commerce. And the complaint informs us that the employment from which appellant was allegedly barred was in an endeavor which is neither interstate nor commerce.

STARE DECISIS.

In part II of his brief appellant contends that the *Toolson* case affords no legal precedent for decision of a problem related to the operations of professional football. He would limit the effect of the *Toolson* decision to the "business of baseball". He does not attempt to consider the effect of the *Toolson* case upon the *Federal Baseball* case but from his position that the activities of football must be viewed as a problem *de novo* it must be the further contention of appellant that the holding of the *Federal Baseball* case is also limited by the *Toolson* decision to the "business of baseball". Certainly appellant is aware that prior to the *Toolson* decision the *Federal Baseball* case had not received such a restricted application. The holding of the *Federal Baseball* case has constituted the basis for the decision of numerous factual situations

wholly unrelated to the "business of baseball". The United States Supreme Court has cited the decision with approval on three occasions (*Hart v. B. F. Keith Vaudeville Exchange et al.*, 262 U.S. 271, 273 (1923), 43 S. Ct. 540, 67 L. Ed. 977; *U.S. v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162; *North American Company v. Securities and Exchange Commission*, 327 U.S. 686, 694, 66 S. Ct. 785, 90 L. Ed. 945 (1946)).

As recently as 1954 it was cited in a dissenting opinion together with the *Toolson* case in relation to problems of the construction industry (*U.S. v. Employing Plasterer's Assn.*, 347 U.S. 452).

It has been cited at least five times by the Courts of Appeal in relation to matters other than the "business of baseball". (*United States v. Fur Dressers' & Fur Dryers' Assn.* 5 F. 2d 869, 873 (1926); *Hart v. B. F. Keith Vaudeville Exchange et al.*, 12 F. 2d 341, 47 A.L.R. 775 (1926); *Boynton v. Fox West Coast Theatres*, 60 F. 2d 851 (1932); *Neugen v. Associated Chautauqua Company*, 70 F. 2d 605 (1934); *Conley v. San Carlo Opera Co.*, 163 F. 2d 310, 311 (1947).) The District Courts have cited the decision at least five times on matters unrelated to baseball. (*Federal Trade Commission v. Smith*, 1 Fed. Supp. 247, 250 (1932); *In re American State Public Service Co.*, 12 Fed. Supp. 667 (1935); *S.E.C. v. Electric Bond & Share Co.*, 18 Fed. Supp. 131, 146 (1937); *San Carlo Opera Co. v. Conley*, 72 Fed. Supp. 825 (1946); *McComb v. Turpin*, 81 Fed. Supp. 86 (1948); *Young v. Kellex Corp.*, 82 Fed. Supp. 953, 961 (1948).)

To undo a construction of a decision which has become so crystallized should require some very direct and positive statements to such effect. They are not found in the *Toolson* case.

Subsequent to the filing of the brief of appellant herein, the United States Supreme Court has handed down its decision in *United States of America v. International Boxing Club of New York, Inc.* (The case was decided January 31, 1955 and advanced copies of printer's proof do not indicate the citation.) Whether such decision does anything toward the clarification of the *Toolson* case or of the status of professional sports is problematical. The opinion of Chief Justice Warren states that "*Toolson* neither over-ruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*." Justice Frankfurter believes that *Toolson* followed the *Federal Baseball* decision.

It is obvious from the record on appeal that the complaint herein was born of a hope encouraged by language in one of the opinions in the *Gardella* case (172 F. 2d 402) that the *Federal Baseball* case was an "impotent zombi" and would be over-ruled by the Supreme Court with the first set of facts which justified its attack. The willingness of appellant to abide by the decision of the *Toolson* case rather than to press his matter for trial below testifies as to the promptings for the filing of this action. However despite the agreement to be governed by the decision of the *Toolson* appeal appellant refuses to accept the ruling of the Supreme Court that the *Federal Base-*

ball case is still the law. He dismisses entirely the *Federal Baseball* case or limits its effect by some unexpressed refinement. He would restrict our considerations to the *Toolson* decision and would confine the holding of such case to only such facts as could be classified as the "business of baseball".

We cannot permit the doctrine of *stare decisis* to become so proscribed. We are not treating with the principles of *res adjudicata*. *Stare decisis* comprehends a broader aspect. In its accepted meaning it assures us that a legal principle developed and declared will apply to all situations within its scope, and will not be limited to the particular situation suggesting it. We must further recognize that we are considering the doctrine as applied to decisions of the United States Supreme Court. It is so obvious as not to require statement that the highest Court in the land is not to have the opportunity of passing upon every conceivable factual situation — that decisions which it renders are to be regarded as statements of principles of law which are to be applied to situations other than the precise one in which the pronouncement was made.

The Justices of the Supreme Court on various occasions and in varying contexts, have indicated their awareness that the decision in a particular case would be applicable to other situations, e.g.:

"As these tax decisions may have an influence on subsequent decisions beyond the limited area of the issues decided, I have thought it advisable to state my position for whatever light it may

throw * * *” (Mr. Justice Reed in, *Comm’r v. Estate of Church*, 335 U. S. 632, 651 (1949).)

“* * * But sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge.” (Mr. Justice Jackson, in *First National Bank v. United Air Lines*, 342 U.S. 396, 398 (1952).)

“We are framing here a rule of evidence for criminal trials in the federal courts. That rule must be drawn in light not of the particular case but of the system which the particular case reflects. * * * ” (Mr. Justice Douglas in, *United States v. Carignan*, 342 U.S. 36, 47 (1951).)

The opinion of Justice Frankfurter in the *International Boxing Club* case presents the precise position for which appellees here contend:

“Since, in the light of all the circumstances, *Federal Baseball* was left undisturbed by *Toolson*, I cannot bring myself to construe the respect that was thus accorded to stare decisis to be narrower than that all situations identic with what was passed on in the *Federal Baseball* case should be covered by it. I cannot translate even the narrowest conception of stare decisis into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it.”

The opinions of Justices Frankfurter and Minton in the *Boxing* case consider all sports as being in the same category. We feel that such conclusion overstates the position and that greater familiarity with

sports will disclose basic differences in the organization and operation of some, and that particular reason exists to distinguish between boxing, an individual endeavor and baseball, a team sport which requires a control over the distribution of players so as to maintain a balance of power among the teams and thus insure competition. But we challenge anyone to indicate how baseball and football differ by "one legal jot or tittle". We direct the attention of the Court to the almost identical complaints found in the *Toolson*, *Kowalski*, *Corbett* cases and in the transcript here before us.

As Justice Frankfurter points out the baseball cases considered the "constituents of baseball in relation to the Sherman Act". The cases must be regarded as a determination of the applicability of antitrust statutes to a system known as organized baseball.

Certainly no one could contend that the nature of the game itself or the rules of Abner Doubleday were the occasions of the complaints which brought the Sherman Act to bear upon the "national pastime". The basis for the scrutiny of baseball in the light of antitrust legislation is found in the pattern established by the organization of the sport into leagues of member teams and the control of player talent. The gravamen of all charges directed against baseball is the uniform players' contract embodying a "reserve clause" which binds a player to the club which first obtains his services. The pattern of baseball which constituted the basis for the various challenges of the sport as of monopolistic character is expressed in

paragraphs VIII, X and XI of the *Toolson* complaint:

“VIII.

That the Defendants are engaged in the business of producing professional baseball games for exhibition; that the business of professional baseball in the United States is conducted by the various professional teams playing games against each other for exhibition to the general public. That the teams are composed of highly skilled players under contract for their services to the Club owning and operating that team. To facilitate this business the professional teams or clubs are organized into leagues. These leagues are organized from Clubs in certain geographic areas and from Clubs whose players are that of the same general abilities. Each Club then plays games for exhibition with each of the other Clubs in its league during the baseball season, which is normally from the middle of the month of April to the end of the month of September each year.

The Defendants, American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs are designated the Major Leagues. These Leagues are composed of eight teams each of whose players are the most highly skilled in the game. The Defendant, The New York Yankees, Inc., a corporation, is a member of the Defendant, American League of Professional Baseball Clubs, an unincorporated association. All of the other leagues in professional baseball are designed as Minor Leagues and their teams are designated as Minor League teams. That all of the Minor League teams are members of the various so-called Minor Leagues; that each

Minor League is a member of the Defendant, National Association of Professional Baseball Leagues, an unincorporated association. That all of the professional baseball in the United States is a part of the above outlined organization. That the Defendant, Pacific Coast League of Professional Baseball Clubs is a member of Defendant, National Association of Professional Baseball Leagues, that the Defendant Hollywood Baseball Association, a corporation, the Los Angeles Baseball Club, a corporation, and the Binghamton Exhibition Company, Inc., a corporation, are members of Minor Leagues, which leagues are members of Defendant, National Association of Professional Baseball Leagues.”

“X.

That all of the baseball clubs in organized professional baseball are members of the Defendant National League of Professional Baseball Clubs, the Defendant American League of Professional Baseball Clubs or of a league which is a member of the Defendant National Association of Professional Baseball Leagues.”

“XI.

That the Defendants and each of them, have entered into or agreed to be bound by a contract in the restraint of Interstate Commerce; that said contract is designated as the Major-Minor League Agreement, dated December 6, 1946, and provides in effect that:

1. All players' contracts in the Major Leagues shall be of one form and that all players' contracts in the Minor Leagues shall be of one form.

2. That all players' contracts in any league must provide that the Club or any assignee thereof shall have the option to renew the player's contract each year and that the player shall not play for any other club but the club with which he has a contract or the assignee thereof.

3. That each club shall, on or before a certain date each year, designate a reserve list of active and eligible players which it desires to reserve for the ensuing year. That no player on such a reserve list may thereafter be eligible to play for any other club until his contract has been assigned or until he has been released.

4. That the player shall be bound by any assignment of his contract by the club, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ability.

5. That there shall be no negotiations between a player and any other club from the one which he is under contract or reservation respecting employment either present or prospective unless the Club with which the player is connected shall have in writing expressly authorized such negotiations prior to their commencement.

6. That in the case of Major League players, the Commissioner of Baseball and in the case of Minor League players, the President of the National Association, may determine that the best interests of the game require a player to be declared ineligible and, after such declaration, no club shall be permitted to employ him unless he shall have been reinstated from the ineligible list.

7. That an ineligible player whose name is omitted from a reserve list shall not thereby be rendered eligible for service unless and until he has applied for and been granted reinstatement.

8. That any player who violates his contract or reservation, or who participates in a game with or against a Club containing or controlled by ineligible players or a player under indictment for conduct detrimental to the good repute of professional baseball, shall be considered an ineligible player and placed on the ineligible list.

9. That an ineligible player must be reinstated before he may be released from his contract.

10. That clubs shall not tender contracts to ineligible players until they are reinstated.

11. That no club may release unconditionally an ineligible player unless such player is first reinstated from the ineligible list to the active list."

Professional football is organized upon the identical pattern as that which governs professional baseball. As the Radovich complaint alleges the various teams are grouped into leagues for the purpose of competition. The control of player talent is an integral part of the system. Such control is effected through the use of a uniform players' contract which embodies a 'reserve clause' determining the team affiliation of the player. These are the aggrieving constituents of the system of football just as they are the aggrieving constituents of the system of baseball. The veritable identity of the manner of operations of the two sports

is recognizable from the allegations of plaintiff in the complaint here before us. Comparison is invited of the foregoing excerpts from the *Toolson* complaint and the following paragraphs of the Radovich complaint.

“12. Beginning in or about the year 1938 and continuing without interruption thereafter up to and including the date of filing of this complaint, the defendants and others acting in concert with them have violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize, and by unlawfully contracting, combining and conspiring to restrain trade and commerce among the several states in the business of professional football and by conspiring to monopolize, control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States.

13. The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:

a. That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the NATIONAL LEAGUE:

b. That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than his original employer unless the employer consents.

c. That defendants agree that any player violating the reserve clause will be blacklisted by all clubs in the NATIONAL LEAGUE so that no club in the said NATIONAL LEAGUE may hire him."

It is inconceivable that a decision upon the basis of the facts set forth in the *Toolson* complaint would be inapplicable to the facts found in the Radovich complaint. The only distinguishing feature is that one sport is called "baseball" and the other "football".

It is to be anticipated that the reply brief of appellant will endeavor to make applicable to the football pattern the decision of the Supreme Court in the *Boxing* case. We believe the two situations to be clearly distinguishable. As we have heretofore indicated the factors which demand restraints and controls in the baseball and football sports do not obtain in the field of boxing. Baseball and football are team sports and in order that exhibitions of such sports present interest to spectators team competition must be keen. Unbalanced teams during the early days of baseball destroyed public interest and reduced at-

tendance. Out of such experience grew the pattern ultimately adopted by both baseball and football. It was designed to affiliate players with a team upon a more or less permanent basis so that coordinated units could be developed and so that the wealthier owners would not be able to corner the most talented players by offering higher salaries. The integrity of the sport was likewise a consideration, permanence of employment with one team assuring the public that a player was interested only in the success of his team and not that of a rival team for whom he was to be employed in the next playing season.

None of the reasoning prompting the mechanics of baseball and football operations would be applicable to the presentation of boxing exhibitions. There is absolutely no requirement or justification for all contenders for the heavyweight title to be under contract to one organization. On the contrary such arrangement could only be a cause for distrust.

The complaint in the boxing case presents an entirely different set of facts than that with which we are confronted. The boxing combination did not attempt to stabilize a sport but to eliminate the leading competing promoter, to acquire exclusive right to promote professional boxing contests in all the principal arenas where championship matches could be successfully presented and to obtain the agreement of each title contender to take part only in title contests promoted by the defendants. The complaint further alleges that the revenue derived from broadcasting, telecasting and motion picture displays of

boxing exhibitions is not only substantial but in some instances exceeds the gate receipts. Proceeds from such media are alleged to be in excess of 25% of total revenue.

The Radovich complaint makes no such allegations. The allegation of "lucrative contracts" for the interstate communication by radio and television of the playing of the games is meaningless. The record in *United States v. National Football League* (116 F.S. 319), cited by appellant, discloses that the revenue from the sale of both radio and television rights by the member teams of the League for the five year period 1947-1951 amounted to only 4.05% of total revenue.

If as the major opinion seems to indicate, the Boxing decision is predicated upon the prominence which radio, television and motion pictures play in the staging of bouts then the minor part which they play in the football scene should be a distinguishing note. However serving such statistics may be we are constrained to the opinion that they are not the real criterion. As the logic of Justice Minton makes clear these are still incidents to the exhibition and to make them the controlling factor is to give to the incidents more importance than the exhibition. Justice Minton reminds us:

"We are not dealing here with the question of whether the respondents have restrained trade in or monopolized the radio and television industries. That is a separate consideration. What others do with pictures they are allowed to take of a

wholly local spectacle or exhibition by thereafter using the channels of interstate commerce to exhibit them does not make a package deal. The respondents have nothing to do with the transmission of sound or the pictures. Because these incidents are not directly involved, no effort was made to bring the radio and television companies and sponsors into the case.”

A further basis for distinction between the *Boxing* case and the instant one is found in the fact that the plaintiff-appellants are respectively, the United States Government and a private individual. The fact that the government is a party to litigation would eliminate one of the bases for scrutiny to which a complaint by a private person would be subject. It would be assumed that public interest is involved. It becomes unnecessary to determine whether the plaintiff is one “seeking the windfall of treble damages because of incidental harm”. (*Conference of Studio Unions v. Loew's, Inc.*, 193 F. (2d) 51.) Such inquiry is material to the Radovich case and the answer thereto is obvious. The law tells us that recovery is to be withheld from those who seek such windfall.

CONCLUSION.

Throughout this brief appellees have advanced several distinct legal positions each of which is a justification for the order made below. It would of course be more simple to state that the matter is disposed

of by the ruling made with respect to organized baseball. We sincerely believe the baseball cases to be controlling. But we further urge that the complaint is also defective in the various other aspects specified. We again emphasize that whatever the nature of the activities of appellees, and however the exhibitions of football may impinge upon interstate commerce, nothing complained of was designed to, or did have any effect upon any instrumentality of interstate trade or commerce. We maintain that nothing complained of had any effect upon competition or upon public interests, substantial or otherwise. We contend that no conduct of appellees in the realm of the interstate incidents of the sport caused any of the damage alleged to have been sustained by appellant.

For each of these reasons we respectfully submit that the order of dismissal be affirmed.

Dated, San Francisco, California,
February 23, 1955.

Respectfully submitted,

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Attorneys for Appellees.

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No. 14,394

United States Court of Appeals
For the Ninth Circuit

WILLIAM RADOVICH,

Appellant,

VS.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellees.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

REPLY BRIEF OF APPELLANT.

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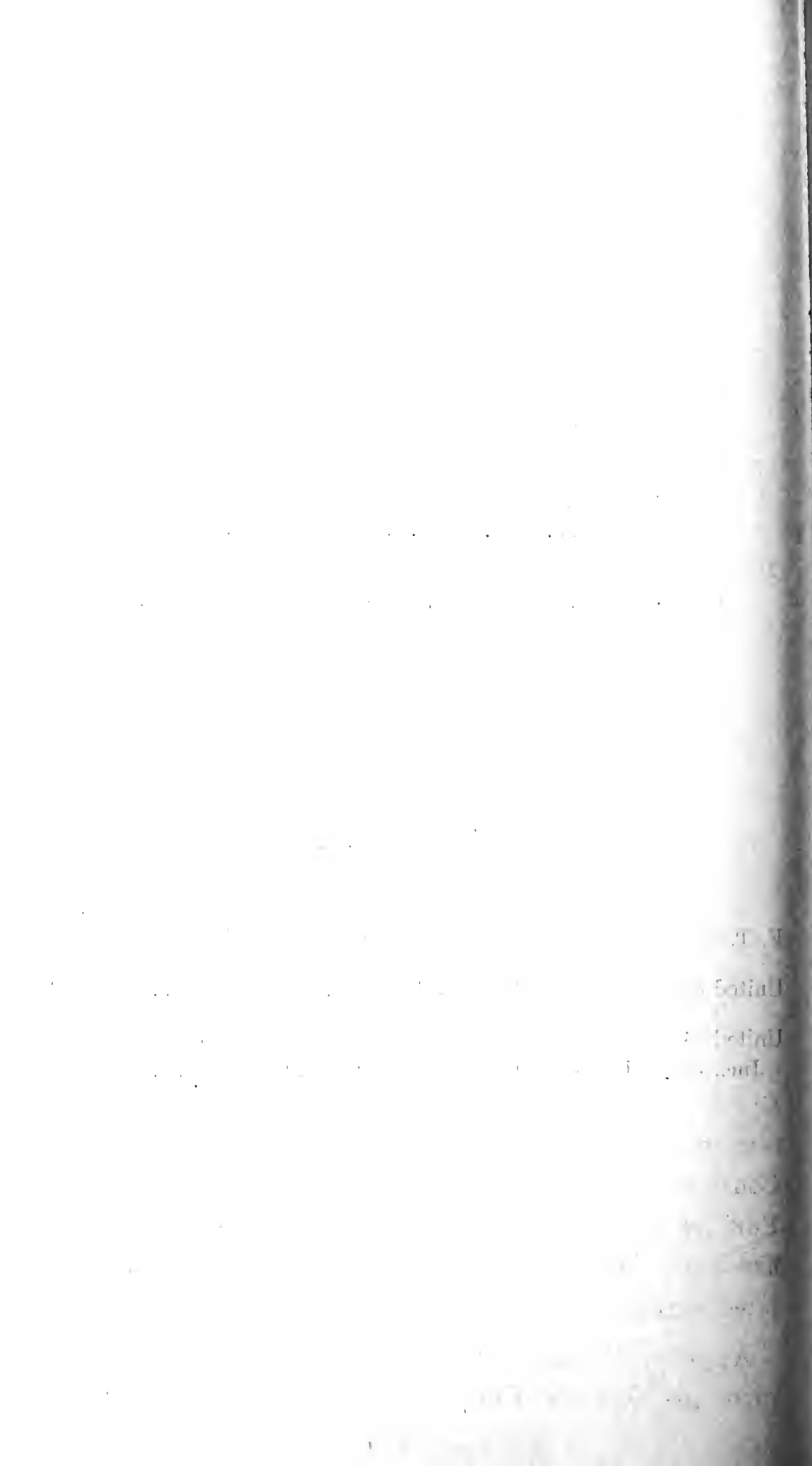


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**United States Court of Appeals
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WILLIAM RADOVICH,

Appellant,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellees.

Appeal from the United States District Court,
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REPLY BRIEF OF APPELLANT.

I.

**U. S. v. INTERNATIONAL BOXING CLUB IS A HOLDING THAT
ONLY BASEBALL IS EXEMPT FROM THE OPERATIONS OF
THE ANTITRUST LAWS.**

No attempt by appellee National Football League (hereinafter called N.F.L.) here to quote from the minority opinions of the Supreme Court (N.F.L. Brief, pp. 30, 39) and to cloud the holding of this determining decision can hide the fact that the Supreme Court in *U. S. v. International Boxing Club of New York, Inc.*, (Jan. 31, 1955) 1954 Trade Cases, 67,941 has ruled that only baseball has been given an implied legislative exemption from the antitrust laws.

Appellee throughout its brief fails to recognize the principle that the Court cannot legislate exemptions

under the antitrust laws. The Supreme Court in the *Toolson* case recognized an implied exemption because Congress had failed to act with the *Federal Baseball League* case standing as law.

The plain fact of the matter is that the Supreme Court failed to go where appellees ask this Court to go. It held specifically that "sports" were within the antitrust laws. At 1954 Trade Cases, 67,941, page 7074 it stated:

"It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports are outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue but whether an exemption should be granted in the first instance. And that is for Congress to resolve. See United States v. South-Eastern Underwriters Assn. (1944-45 Trade Cases, Pr. 57,253) 322 U.S. 533, 561.)"

Failing to obtain an exemption and granting the statement of the Supreme Court in *U. S. v. Employing Plasterers' Assn.* (N.F.L. Brief, pp. 20-21) it would appear that appellees must go to a hearing on the merits.

II.

PROOF OF A PUBLIC HARM IS MADE WHEN IT IS ESTABLISHED THAT DEFENDANTS HAVE VIOLATED THE ANTITRUST LAWS.

Appellees ask this Court to make a further act of legislation. They seek to have this Court hold that as

a matter of law the complaint fails to establish impact on the public. Appellant answers this as follows: (1) The District Court placed its decision squarely on the holding of the *Toolson* case, now inapplicable to other sports. (Tr. 64.) (2) The heart of the appellant's action is a conspiracy to boycott and monopolize to thwart the All-America Conference. It has been taught that a conspiracy to boycott is not the manner in which those with financial power can deal with others. *F. T. C. v. Fashion Originator's Guild*, 61 S.Ct. 703. See also *U. S. v. King*, 229 Fed. 275. Upon proof of this conspiracy, it will have been proved that defendants have violated the antitrust laws. Upon this showing, it will have been proved that appellees have acted contrary to the expressed will of Congress in its desire to protect the public.

The 10th Circuit in the *Shotkin* decision (N.F.L. Brief, pp. 5-8) merely repeated the principle that a private litigant must establish a violation of the anti-trust laws to warrant recovery.

It is respectfully submitted that Congress has given redress to those who have suffered from conspiracies to boycott.

Dated, San Francisco, California,

March 7, 1955.

MAXWELL KEITH,

Attorney for Appellant.







